TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1192.

REECE M. OBERTEUFFER ET AL., PLAINTIFFS IN ERROR,

vs.

WILLIAM H. ROBERTSON, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 31, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Reece M. Oberteuffer *et al.*, plaintiffs, and William H. Robertson, defendant, a manifest error hath happened, to the great damage of the said Reece M. Oberteuffer *et al.*, as is said and as appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the third Monday of October term, 1885, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 2d day of October, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and tenth.

TIMOTHY GRIFFITH,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

Allowed.
W. J. WALLACE.

b UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to sixty-four, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Reece M. Oberteuffer *et al.*, plaintiffs in error, against William H. Robertson, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-fourth day of October, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and tenth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH, *Clk.*

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Reece M. Oberteuffer *et al.*, plaintiffs, and William H. Robertson, defendant, a manifest error hath happened, to the great damage of the said Reece M. Oberteuffer *et al.*, as is said and as appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the third Monday of October term, 1885, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

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Southern District of New York, }

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In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-fourth day of October, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and tenth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH, *Clk.*

[Endorsed:] 9055. United States Supreme Court. Reece M. Oberteuffer & *al.*, plaintiffs in error, *vs.* William H. Robertson, defendant in error. Writ of error. Due service of a copy of the within writ of error Oct. 2, 1885. William Dorsheimer, attorney for def't in error. [Stamped:] U. S. circuit court. Filed Oct. 23, 1885. Timothy Griffith, clerk.

1 Superior Court of the City of New York.

REECE M. OBERTEUFFER, HENRY ABEGG, HENRY H. DAENIKER, Plaintiffs,
against
WILLIAM H. ROBERTSON, Defendant.
} Summons No. 2.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, April 1, 1884.

CHAS. CURIE,
Plaintiffs' Attorney.

Office, No. 44 Exchange place, New York city.

2 [Endorsed:] 9055. No. 2. N. Y. superior court. Reece M. Oberteuffer *& als*, plaintiffs, against William H. Robertson, defendant. Summons. Chas. Curie, plaintiffs' attorney, 44 Exchange place, New York city. Due service hereof admitted this 1st day of April, 1884. C. S. T. Received Apr. 16, 1884. U. S. attorney's office.

3 The President of the United States of America to the judges of the superior court of the city of New York, Greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in [L. S.] the second circuit, shall be certified of a certain cause commenced before you against William H. Robertson, defendant, by Reece M. Oberteuffer & *als*, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 29th day of April, 1884, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Morrison R. Waite, Esquire, Chief Justice of the Supreme Court of the United States, the 24th day of April, in the year one thousand eight hundred and eighty-four.

TIMOTHY GRIFFITH, *Clerk.*

ELIHU ROOT,
United States Attorney, Attorney for Defendant.

4 [Endorsed:] 9055. U. S. circuit court. Reece M. Oberteuffer & *als vs.* William H. Robertson. Copy certiorari. Elihu Root, U. S. attorney, attorney for defendant. Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, April 24, 1884. Yours, Elihu Root, U. S. attorney, attorney for defendant. To C. C., plaintiff's attorney. Due service of a copy of the within and of the above notice is hereby admitted. New York, April 24, 1884. Chas. Curie, plaintiffs' attorney, 44 Exchange place, *plaintiff's attorney.*

5

Bill of Particulars.

Name of Importer, Oberteuffer, Abegg & Daeinker.

Description of goods.	Whence imported.	Name of vessel.	Date of invoice.	Date of entry at custom-house.	Amount of duty illegally exacted.	Date of payment of duties in excess.	Protest filed.	Date of appeal to Secretary of the Treasury.	Date of Secretary's decision.
For coverings & putting up charges on hosiery, gloves, & other m'reh'dse. { On cases 4836, 4837	Bremen	Werra	1883. June 29	1883. July 23	20 80	1883. Aug. 10	1883. Aug. 14	1883. Aug. 14	No answer rec'd.
" " 4852–4872			July 5		114 80				
" " 168			" 4		5 20				
					$140 80				

6 [Endorsed:] 9055. U. S. circuit court, southern district of New York. Reece M. Oberteuffer & *als. against* Wm. H. Robertson. Bill of particulars. New York, May 3, 1884. To Elihu Root, esquire, defendant's attorney. Sir: Please to take notice that this action is brought to recover duties illegally exacted by the defendant, as collector of customs at the port of New York, and the within is the plaintiff's bill of particulars. Chas. Curie, plaintiff's attorney, 44 Exchange Place. Received May 3, 1884. U. S. attorney's office.

7 *Complaint.*

Circuit Court of the United States for the Southern District of New York.

REECE M. OBERTEUFFER, HENRY ABEGG, and HENRY H. DAENIKER, Plaintiffs,

against

WILLIAM H. ROBERTSON, Defendant.

Plaintiffs complain—

1st. That defendant was, during the times hereinafter named, collector of customs of the United States at the port of New York.

2d. That plaintiffs were, during said times, partners in trade, under the firm name of Oberteuffer, Abegg, and Daeniker, and, as such, duly imported and entered at the port of New York the goods described in the bill of particulars annexed.

3d. The defendant, as such collector, exacted from plaintiffs, as and for duties thereon, and plaintiffs, in order to obtain said goods, were compelled to pay, and did pay, the sum of one hundred and forty $\frac{80}{100}$ dollars in excess of the amount required by law.

4th. That plaintiffs filed with said defendant due and timely protests, in writing, upon each entry of said goods against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto, and also as above stated.

5th. That plaintiffs made due and timely appeals in each case to the Secretary of the Treasury, who has affirmed the decision of defendant as to certain of said entries, and as to the rest of said entries, has neglected to answer said appeals, and more than ninety days had elapsed since said unanswered appeals when this action was commenced.

6th. That the bill of particulars, hereto annexed, states for each importation separately the date of entry at the custom-house, of the payment of duty in excess, of the filing of the said protests, of the appeal to the Secretary of the Treasury, and of his decision thereon, together with the other particulars required by law, and is made a part hereof.

7th. That said sum, so exacted as aforesaid, has never been repaid to plaintiffs, and is still due and owing to them.

Wherefore plaintiffs demand judgment against defendant for one hundred and forty $\frac{80}{100}$ dollars, with interest on the several sums named in the bill of particulars from the several dates of payment,

as appear thereby, together with the costs and disbursements of this action.

CHAS. CURIE,
Plaintiffs' Attorney, 44 Exchange Place.

8 [Endorsed:] 9055. United States circuit court. Reece M. Oberteuffer & *als.* against William H. Robertson. Complaint. Chas. Curie, plaintiffs' attorney, 44 Exchange Place. Received May 31, 1884, U. S. attorney's office.

9 Circuit Court of the United States for the Southern District of New York.

REECE M. OBERTEUFFER *et al.*
versus
WILLIAM H. ROBERTSON, Collector, etc. } N. S. 9055.

The defendant answers to the complaint as follows:

I. He denies that the true duty, or that the true and lawful rate of duty, on the goods referred to in the complaint was as stated in the complaint; and he denies that the plaintiffs were compelled to pay, or did yay, defendant, as collector or otherwise, the sum stated in the complaint, or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise.

II. He denies that the plaintiffs filed with defendant any protest or protests in writing in which the grounds of objections to the exaction of duties on said goods were distinctly and specifically stated.

III. He denies that the sum stated in the complaint, or any sum, is now due and owing the plaintiffs.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the times therein mentioned were in fact such goods as are described in the said complaint.

V. As to the following importations, severally, he alleges that no protest was filed within ten days after the ascertainment and liquidation of the duties thereon: per Wena, July 23d, 1883.

VI. As to the following importations, severally, he alleges that no appeal was taken to the Secretary of the Treasury within thirty days after the date of the ascertainment and liquidation of duties thereon: per Wena, July 23d, 1883.

VIII. As to the following importations, severally, he alleges that this action was brought without the decision of the Secretary of the Treasury on the appeal from the ascertainment and liquidation of duties thereon having been first had, and without ninety days having elapsed from the date of such appeal: per Wena, July 23, 1883.

10 IX. And, further answering, defendant alleges that all moneys received by him from the plaintiff- in respect of the importations in the complaint alleged to have been made were demanded of plaintiff-, and were by plaintiff- voluntarily paid to him in his capacity as collector of customs as and for duties due the

United States on imported merchandise, and were forthwith before the commencement of this action, and before the receipt by defendant of any protest or objection on the part of the plaintiff, paid over by defendant in his official capacity aforesaid to the United States, and placed beyond his control.

X. And, further answering, defendant alleges that all moneys received by him from the plaintiff-, in respect of the importations in the complaint alleged to have been made, were sums due from plaintiff to the United States as duties according to the rate of duty imposed by law upon articles of merchandise imported by plaintiff and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon plaintiff's entry thereof were collected or received by defendant from the plaintiff.

Wherefore defendant demands judgment that the complaint be dismissed with costs.

WM. DORSHEIMER,
United States Attorney, Attorney for the Defendant.

[Endorsed:] N. S. 9055. U. S. circuit court, southern district of New York. Reece M. Oberteuffer *et al. vs.* W. H. Robertson, collector, etc. Answer. Elihu Root, United States attorney, attorney for defendant. Due service of a copy of the within answer is hereby admitted. New York, May 12th, 1884. Charles Curie, per S., plaintiffs' attorney. To ——, plaintiff's attorney.

11 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New York, on Monday, the twelfth day of May, in the year of our Lord one thousand eight hundred and eighty-four:

Present: The honorable William J. Wallace, circuit judge.

REECE M. OBERTEUFFER & *al.*
vs.
WILLIAM H. ROBERTSON. } 9055.

Now come the plaintiffs, by Stanley, Clarke & Smith, Esq'rs, their attorneys, and move the trial of this cause. Likewise comes the defendant, by Samuel B. Clarke, Esq., ass't U. S. attorney, his attorney.

Thereupon a jury is impanelled, & the cause proceeds to trial.

After hearing the evidence of the parties & the argument of counsel, on Tuesday, May 13, 1884, the court directs the jury to find a verdict for the defendant. Thereupon the jury render a verdict, whereby they find for the defendant.

On motion of counsel for plaintiffs, it is ordered that the plaintiffs have a stay of proceedings for sixty (60) days.

A copy.

[L. S.] TIMOTHY GRIFFITH, *Clerk.*

12 *Judgment.*

United States Circuit Court, Southern District of New York.

REECE M. OBERTEUFFER & *al.*
vs.
WILLIAM H. ROBERTSON. } 9055.

The issues in this action having been brought on for trial before Mr. Judge Wallace and a jury, at a circuit court of the April term, 1884, and the issues having been tried, and a verdict for the defendant having been duly rendered on the 13 day of May, 1884, and his costs having been adjusted at $48.85:

Now, on motion of William Dorsheimer, United States attorney, for defendant, it is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $48.85, his taxed costs, and have execution therefor.

Judgment signed this 23rd day of October, 1885, *nunc pro tunc*, as of Oct. 2d, 1885, as per order of court filed Oct. 23, 1885.

JOHN A. SHIELDS,
Deputy Clerk.

13 [Endorsed:] 9055. United States circuit court. Reece M. Oberteuffer & *al. vs.* Wm. H. Robertson. Judgment roll. William Dorsheimer, United States attorney, for defendant. Costs, $48.85. U. S. circuit court. Filed Oct. 23, 1885, *nunc pro tunc*, as of Oct. 2d, 1885. Timothy Griffith, clerk.

14 *Bill of Exceptions.*

United States Circuit Court, Southern District of New York.

REECE M. OBERTEUFFER, HENRY ABEGG, and HENRY H. DAENIKER,
Plaintiffs,
against
WILLIAM H. ROBERTSON, Defendant.

Afterwards, to wit, on the ninth, twelfth, and thirteenth days of May, 1884, at a stated term of this court, begun and holden on the first Monday of April, 1884, before the Honorable William J. Wallace, circuit judge, the aforesaid issue so joined as between the said parties as aforesaid, as by the record more fully appears, came on to be tried by a jury duly empanneled and sworn for that purpose, the said plaintiffs being represented by Stephen G. Clarke and Edwin B. Smith, Esqrs., and the said defendant by Hon. Elihu Root, United States attorney, and Samuel B. Clarke, Esq., assistant United States attorney. And in the course of the trial the said counsel for the plaintiffs did take and allege sundry exceptions to the rulings, instructions, charge, and directions of the court, and to the refusal of the court to give certain instructions and directions to the jury, as then and there prayed for by them, which said exceptions are hereinafter severally set forth.

To maintain the said issues upon the part of the plaintiffs, testimony was introduced showing the importation of the goods
15 in question by them in the condition and under the circumstances below stated.

July 23, 1883, the plaintiff-firm, Oberteuffer, Abegg & Daeniker, received at New York, where their established place of business is, per steamer Warra from Hamburg, two cases of woolen gloves and twenty-cases of cotton hosiery, which goods they entered at the port of New York upon three invoices: the first, including only the gloves; the second, twenty-one cases of hosiery; and the third, a single case of the hosiery.

The entry marked Exhibit "A" and the three invoices marked respectively B, C, & D, with the appraiser's return thereon, were then introduced in evidence as follows:

16 *Entry of Merchandise Imported by Oberteuffer, Abegg & Daeniker in the Str. Warra from Bremen.*

NEW YORK, *July* 23, 1883.

O. A. & D.	4836–4837	Two cases wool gloves	M 2,585 05		
		Less cases, &c	242 50		
				M 2,342	55
"	4852–4872	Twenty-one cases cotton hosiery (made on frames)	M 14,741 25		
		Less cases, &c	1,616 50		
				M 13,124	75
A. C. N.	168	One case cotton hosiery (made on frames)	M 1,492		

OBERTEUFFER, ABEGG & DAENIKER.

17 B.

LEIPZIG & CHEMNITZ (SAXONY), *July 5th*, 1883.

Mess. Oberteuffer, Abegg & Daeniker, New York, bought of Winckler & Co.

O., A. & D.

		4852 one case.			
400	200 doz. lad's' brown balbr. hose	4 30	860 —		
	8, 8², 9, 9², 10			M 860	—
	Incl. 10, 55, 70, 55, 10				
	No. 4853 one case.				
" 229 " " " " "		4 30	984 70		
	" 10, 65, 79, 65, 10			984	70
	No. 4854 one case.				
425 100 " " " " "		4 30	430 00		
	" 5, 27, 35, 28, 5			430	00

12 *Judgment.*

United States Circuit Court, Southern District of New York.

REECE M. OBERTEUFFER & *al.*
vs.
WILLIAM H. ROBERTSON. } 9055.

The issues in this action having been brought on for trial before Mr. Judge Wallace and a jury, at a circuit court of the April term, 1884, and the issues having been tried, and a verdict for the defendant having been duly rendered on the 13 day of May, 1884, and his costs having been adjusted at $48.85:

Now, on motion of William Dorsheimer, United States attorney, for defendant, it is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $48.85, his taxed costs, and have execution therefor.

Judgment signed this 23rd day of October, 1885, *nunc pro tunc*, as of Oct. 2d, 1885, as per order of court filed Oct. 23, 1885.

JOHN A. SHIELDS,
Deputy Clerk.

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14 *Bill of Exceptions.*

United States Circuit Court, Southern District of New York.

REECE M. OBERTEUFFER, HENRY ABEGG, and HENRY H. DAENIKER,
Plaintiffs,
against
WILLIAM H. ROBERTSON, Defendant.

Afterwards, to wit, on the ninth, twelfth, and thirteenth days of May, 1884, at a stated term of this court, begun and holden on the first Monday of April, 1884, before the Honorable William J. Wallace, circuit judge, the aforesaid issue so joined as between the said parties as aforesaid, as by the record more fully appears, came on to be tried by a jury duly empanneled and sworn for that purpose, the said plaintiffs being represented by Stephen G. Clarke and Edwin B. Smith, Esqrs., and the said defendant by Hon. Elihu Root, United States attorney, and Samuel B. Clarke, Esq., assistant United States attorney. And in the course of the trial the said counsel for the plaintiffs did take and allege sundry exceptions to the rulings, instructions, charge, and directions of the court, and to the refusal of the court to give certain instructions and directions to the jury, as then and there prayed for by them, which said exceptions are hereinafter severally set forth.

To maintain the said issues upon the part of the plaintiffs, testimony was introduced showing the importation of the goods
15 in question by them in the condition and under the circumstances below stated.

July 23, 1883, the plaintiff-firm, Oberteuffer, Abegg & Daeniker, received at New York, where their established place of business is, per steamer Warra from Hamburg, two cases of woolen gloves and twenty-cases of cotton hosiery, which goods they entered at the port of New York upon three invoices: the first, including only the gloves; the second, twenty-one cases of hosiery; and the third, a single case of the hosiery.

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		Less cases, &c	242 50		
					M 2,342 55
"	4852–4872	Twenty-one cases cotton hosiery (made on frames)	M 14,741 25		
		Less cases, &c	1,616 50		
					M 13,124 75
A. C. N.	168	One case cotton hosiery (made on frames)	M 1,492		

OBERTEUFFER, ABEGG & DAENIKER.

17 B.

LEIPZIG & CHEMNITZ (SAXONY), *July 5th*, 1883.

Mess. Oberteuffer, Abegg & Daeniker, New York, bought of Winckler & Co.

O., A. & D.

						4852 one case.			
400	200	doz.	lad's'	brown	balbr.	hose	4 30	860 —	
						8, 8², 9, 9², 10			M 860 —
						Incl. 10, 55, 70, 55, 10			
						No. 4853 one case.			
"	229	"	"	"	"	"	4 30	984 70	
						" 10, 65, 79, 65, 10			984 70
						No. 4854 one case.			
425	100	"	"	"	"	"	4 30	430 00	
						" 5, 27, 35, 28, 5			430 00

							No. 4855 one case.			
"	100	"	"	"	"	"	----------	4 30	430 00	
							" 5, 28, 35, 27, 5			430 00
							No. 4856 one case.			
"	100	"	"	"	"	"	----------	4 30	430 00	
							" 5, 27, 35, 28, 5			430 00
							No. 4857 one case.			
"	100	"	"	"	"	"	----------	4 30	430 00	
							" 5, 28, 35, 27, 5			430 00
							No. 4858 one case.			
475	100	"	"	"	"	"	----------	5 55	555 00	
	Silk clocks.						5, 27, 35, 28, 5			555 00
							No. 4859 one case.			
"	100	"	"	"	"	"	----------	5 55	555 00	
		"					5, 28, 35, 27, 5			555 00
							No. 4860 one case.			
"	100	"	"	"	"	"	----------	5 55	555 00	
		"					5, 27, 35, 28, 5			555 00
		Over ----------								M 5,229 70

18

		Over ----------								M 5,229 70
							No. 4861 one case.			
475	100 d'z. lad's' brown balbr. hose						----------	5 55	555 00	
	Silk clocks.						8, 8², 9, 9², 10 5, 28, 35, 27, 5			M 555 —
							No. 4862 one case.			
"	100 d'z.	"	"	"	"		----------	5 55	555 00	
		"					5, 27, 35, 28, 5			M 555 —
							No. 4863 one case.			
"	100	"	"	"	"	"	----------	5 55	555 —	
		"					5, 28, 35, 27, 5			M 555 —
							No. 4864 one case.			
450	160	"	"	"	"	"	----------	5 55	888 —	
		"					8, 40, 55, 50, 7			M 888 —
							No. 4865 one case.			
"	160	"	"	"	"	"	----------	5 55	888 —	
		"					7, 41, 50, 54, 8			M 888 —
							No. 4866 one case.			
500	100	"	"	assorted	"	"	----------	5 30	530	
							Incl. 5, 25, 45, 25, —			M 530 —
							No. 4867 one case.			
"	100	"	"	"	"	"	----------	5 30	530	
							" 5, 25, 45, 25, —			M 530 —

No. 4868 one case.

405 200 " men's all ourd ½ hose ---------- 3 80 760

9, 9², 10, 10², 11 M 760 —
Silk clocks. 5, 30, 70, 60, 35

No. 4869 one case.

" 200 " " assorted " " ---------- 3 80 760 —

" 5, 30, 70, 60, 35 M 760 —

No. 4870 one case.

" 200 " " " " " ---------- 3 80 760 —

" 5, 30, 70, 60, 35 M 760 —

No. 4871 one case.

" 200 " " " " " ---------- 3 80 760 —

" 5, 30, 70, 60, 35 M 760 —

No. 4872 one case.

" 200 " " " " " ---------- 3 80 760

" 5, 30, 70, 60, 35 760 —

Over ---------- M 13,530 70

19

Over ---------- M 13,530 70
Less 3% ---------- 405 95

13,124 75

Packing charges.

For cases. Boxes. Packing.
M 420 1,204 50 42 = M 1,666 50
Less 3% ---------- 50

1,616 50

M 14,741 25

[Custom-house stamp.]

Werra, this 23 day of Jul, 1883.

Custom-house Entry Clerk's Certificate of Entered Value.

35%. Wheeler. Fourteen thousand seven hundred & forty-one ²⁵ R. M. K. ---------- 238
Less case, etc., 161 ---------- 6 50

Appraiser's Report.

Cotton hose. 40%. } Add R. M. K. 1,246.50, less dis., to make m'k't value in marketable condition.

O., A., D.

4859 } Two cases, as noted.
4866 } Add to make m'k't value, as noted.

July 26, 1883.

W. P. McP.
J. AUERBACH.

Approved.

A. P. KETCHUM,
Appraiser.

20 C.

LEIPZIG & CHEMNITZ (SAXONY), *June* 29, 1883.

Mess. Oberteuffer, Abegg & Daeniker, New York, bought of Winckler & Co.

O., A. & D.

4836 one case.

200 d'z. lad's' black cashm. gloves, 3 b'tt's, l'ghts @									4 10	M 820 —	
						6.6^2, 6^{27}, 7.7^2, 7^{28}, 8.8^2, 8^{29}					
Net weight, 60,000 ks.						10,	25,	50,	50,	40,	25
100 "	"	"	"	"	"	6	"	"	------	5 30	530 —
"	"	30,000 ks.				5,	20,	40,	30,	5,	—
											M 1,350 —

No. 4837 one case.

100 "	"	"	"	"	"	4	"	"	------	4 50	450 —
Net weight, 26,000 ks.						7,	15,	27,	25,	18,	8
50 "	"	col'd	"	"		3 full elast.			------	6 15	307 50
"	"	14,000 ks.				—	—	15,	30,	5,	—
50 "	"	black	"	"		3	"	"	------	6 15	307 50
"	"	15,000 ks.				5,	12,	15,	13,	5,	—
											1,065 —
											M 2,415 —
Less 3 %											72 45
											2,342 55

Packing charges:

M 25	220	5			
for cases	boxes	packing, together		M 250 —	
Less 3 %				7 50	242 50
					M 2,585 05

[Custom-house stamp.]

Per S. S. Werra, this 23d day of July, 1883.

Custom-House Entry Clerk's Certificate of Entered Value.

35.40. Wheeler. Twenty-three hundred & forty-two [55] R. M. K., 238.

Appraiser's Report.

W. knit gloves 35.40. } Add R. M. K. 225, less importer's discount, to make market value in marketable condition.

O., A. D. 4837. } Case as noted. Add to make m'k't value as noted.

July 30, '83.

W. P. McP.
J. AUERBACH.

Approved.

A. P. KETCHUM,
Appraiser.

21 D.

HOHENSTEIN, ERSNTHAL, *July 4th*, 1883.

Mess. Oberteuffer, Abegg & Däniker, New York, Sollen au Gottsfried Landgraff, Strumpfwaaren Fabrik seit 1740.

AC N											M	
				1 case, No. 168.								
	87	d'z.,	4966,	Women's fancy brilliant yarn hose,					½ d'z.	boxes	10 —	870 —
	13	"	0,	"	"	"	"	"	"	"	8 —	104 —
	33	"	4966½,	"	"	"	"	"	"	"	10 —	330 —
	9	"	00,	"	"	"	"	"	"	"	8 —	72 —
	7	"	000,	"	"	"	"	"	"	"	8 —	56 —
	29	"	824.05,	Women's brown cotton hose							6 80	197 20
	178	d'z.										M 1,629 20
				Less 4 % discount								" 65 20
												M 1,564 00

Less for—

Case	M 10 —
Freight from Hohenstein to Bremen	" 15 —
And to New York	" 29 —
Consul fees	" 10 75
Insurance	" 10 25
	M 75 —
Less 4 % discount	" 3 — 72 00
	M 1,492 00

[Custom-house stamp.]

Per S. S. Werra, July 23, 1883.

Custom-House Entry Clerk's Certificate of Entered Value.

Wheeler. 40 %. Fourteen hundred & ninety-two R. M. K., 238.

Appraiser's Report.

Cotton hose. 40 %. } Add R. M. 0.30 per doz. to make market value in marketable condition.

A C N 168 } Case as noted. Add to m'k't value as noted.

July 26, '83.

W. P. McP.
J. AUERBACH.

Approved.

A. P. KETCHUM,
Appraiser.

22 Also the protest marked E, as follows:

E.

NEW YORK, *Aug.* 14, 1883.

Hon. Wm. H. Robertson, collecter of customs, New York.

SIR: We protest against the liquidation, as made by you, of our entries of certain merchandise, below referred to, and against the

payment of the duties exacted thereon, and exacted on the charges, of whatever nature thereon, on the following grounds, and upon each and every one of them:

First. That under the act of March 3, 1883, the cost or mark t value of said merchandise is alone dutiable, whereas, in ascertaining the dutiable value thereof, there has been illegally estimated and included as a part of such value charges expressly declared by section 7 of said act to be non-dutiable.

Second. That under the act of March 3, 1883, only the value of said cotton hose or other merchandise is dutiable, whereas the value of the usual and necessary sacks, crates, boxes, and other coverings have been estimated as part of the value of said goods in determining the amount of duties for which they should be liable, contrary to the provisions of section 7, act March 3, 1883.

Third. By the act of March 3, 1883, all duties heretofore exacted upon charges incurred in the importation of merchandise are
23 repealed, but there has been included, in estimating the dutiable value of said goods, actual, usual, and necessary charges for putting up, preparing, and packing said merchandise, and we hereby separately and distinctly protest against all duties assessed by reason of such additions to the actual cost or market value of the actual merchandise imported.

Fourth. That under the act of March 3, 1883, said cotton hose or other merchandise are only dutiable at their first cost or net market value in principal markets of countries whence exported, whereas the appraiser, in fixing the dutiable value of said merchandise, has illegally estimated and included as a part of such value the charges for finishing and putting up said merchandise, or one or more of said charges.

Fifth. That the dutiable value of said merchandise is its cost or true market value at the date of its exportation in the principal markets of the country whence it was exported, free of charges, but you have assessed a duty thereon upon a valuation in excess of such net cost or value.

Sixth. We further protest against the duty assessed hereon, claiming that, for reasons heretofore set forth, the net invoice or entered value is the true legal value upon which the duties should have been assessed, and that the additions made to such value are made contrary to the statutes of the United States, in that non-dutiable charges have been reckoned as a part of the dutiable value of said goods.

24 And we give notice that we pay all higher duties or rates than is claimed above as the legal duty under compulsion, and to obtain and keep quiet possession of our goods; and we also give notice that we do not intend by this protest to relinquish or waive any right we may have to a refund of the difference between the duty exacted of us and any less duty which may hereafter be adjudged the legal duty upon said goods, intending this protest to be made against the present duty charged upon said goods, claiming that said duty is not the legal duty to which said goods are chargeable, holding you and the Government responsible for all

excess of duty exacted by you upon said goods above the legal duty, and protesting against all illegal exactions of duty thereon, and hereby give notice that we intend this protest to apply to all future similar importations by us, and also intend the duplicate protest herewith submitted for transmission by you to the Secretary of the Treasury, under the rules of your office, to be an appeal to him from your decision, and to likewise apply to all future similar importations by us.

Per S. S. Donau, fr. Bremen, May 10, E, $62,548.
" " Gallert, " Hamb'g, July 5, $95,654.
" " Werra, " Bremen, July 13, $94,649.

CHAS. CURIE,
Attorney, 44 Exchange Place, N. Y.
For OBERTEUFFER, ABEGG & DAENIKER.

25 Appeal was duly made to the Secretary of the Treasury and suit brought in due time, and the duties as liquidated were paid to the defendant.

The deposition of ALPHONSE CHRISTLIEB was then read in evidence in behalf of plaintiffs, as follows:

I am employed as buyer by Oberteuffer, Abegg & Daeniker in their glove and stocking department, and have been with that house in this capacity about nine years; I bought for them from here with samples first, and then I bought abroad since seven years ago. I have been abroad twelve or thirteen times, and I think my trip to-morrow will be the fourteenth time. I purchased the goods embraced in the entry by the Werra in July, 1883, from Mr. Winckler, of the firm of Winckler & Co. There are two invoices of goods purchased and one invoice of goods that were consigned; at the same time I bought the goods I made a list of the styles there were in the market that could be consigned to us. Messrs. Winckler & Co.'s places of business are in Chemnitz and Leipsic. I always visited both houses, but our correspondence is mostly with the Leipsic house and the goods are mostly bought in Chemnitz. I think nearly nine-tenths of all hosiery goods in Germany are made in Chemnitz and vicinity. One invoice is hosiery, stockings, ladies' stockings, and gents' stockings, and one invoice is ladies' gloves. There were three invoices by that entry, one of them is consigned hosiery—stockings. I had come back when these goods were received. They put all goods in those boxes exactly like those that you see here, and then the boxes were put up again in cases. The goods were put in
26 these small boxes, and then linings were put in the cases, and the boxes packed in those cases that they might come into this market inside of the cases. The lining was heavy paper or oil-cloth. The lining was put in the cases so that the sea water would not get on the goods, so they would have no damage when they came here. Most of these boxes are identically the same boxes the goods came in, and represent exactly the same style. It is possible some of the styles were closed out, but the goods came in exactly similar boxes. Here is a box marked 4966½; that is the style of the

goods originally contained in the box. There are five numbers on this box, and the other four numbers represent goods in just the same way. The style 4966½ was the identical style contained in this box, and the other numbers represent the same style of goods and packed in similar boxes. The numbers are taken from the invoice. The number of the case 168 is the invoice case number.

The box marked Plaintiffs' Exhibit No. 2 contained the identical goods. It is the identical box which contained goods of the kind imported in Nos. 4868 to 4872, which are the case numbers. All the goods in those cases came in boxes identically like that, and this is one of the identical boxes. They were all one style of goods in those boxes.

The box marked Plaintiffs' Exhibit No. 3 is not an identical box, but it represents the style. It is the same kind. The same kind of boxes were used in styles Nos. 933 and 942, contained in case 4836; and styles 936, 954, 957, contained in case 4837. All those
27 styles are represented by this box. This box has a partition running through the middle lengthwise.

The box marked Plaintiffs' Exhibit No. 4 represents style 827, contained in case No. 168.

The box marked Plaintiffs' Exhibit No. 5 represents style No. 400, in cases 4852 and 4853; also, style 425, in cases 4854 to 4857; also, style 450, in cases 4864 and 4865; also, style 500, in cases 4866 and 4867.

The box marked Plaintiffs' Exhibit No. 6 represents style No. 475, in cases 4858 to 4863. These six boxes that have been marked in evidence exhibit all the styles of boxes that were in those cases embraced in this entry by the Werra.

The two samples marked Plaintiffs' Exhibits 7 and 8 are samples of the same quality and style exactly, and of exactly the same priced goods, and in every way the same as the goods contained in box No. 1. They are the same manufacture, of the same class of goods.

The sample marked Plaintiffs' Exhibit No. 9 is exactly the same style of goods as those imported in the box represented by Exhibit No. 2. It is not a representative of the goods, but a sample of the same goods. The box is the same, and the goods are the same.

The three samples marked Plaintiffs' Exhibits 10, 11, and 12 are three samples of the style and quality Nos. 936, 954, and 957. They are identical samples of those importations. These were contained in case No. 4837. The other two styles contained in the boxes of which No. 3 is a sample are not here. The goods have been disposed of, and we cannot show them. They are very near the
28 same as the three samples that I have just now produced.

The sample marked Plaintiffs' Exhibit No. 13 represents the style and quality of goods imported in box No. 4. It represents the style and quality of goods No. 827, contained in case No. 168.

The two samples marked Plaintiffs' Exhibit 14 and 15 represent the four styles imported in boxes of which Exhibit No. 5 is the representative; this sample represents the styles in cases 4852 and 4853, 4854 to 4857, 4864 and 4865, 4866 and 4867. Exhibit No.

15 represents the style, quality, and price of goods imported in the box Exhibit No. 6.

In box Exhibit No. 1 there were half a dozen of the goods contained in each box. In box No. 2, half a dozen in each box. In No. 3, one dozen in a box, or two half dozens, a half dozen in each layer. In No. 4, half a dozen in a box. In No. 5, half a dozen in a box. In No. 6, a full dozen in a box, enclosed in one package.

Q. The box Exhibit No. 3 contains a partition, which has been marked 3 A?

A. Yes, sir; that is to separate the two layers.

Q. Is this box Exhibit No. 3 the usual box in which such gloves as came to you in it are imported?

A. Yes, sir; not always; some people get them half a dozen in a box, and some get them a dozen in a box; just as they may want them.

Gloves and hosiery such as are contained in the entry in this case are usually put up in boxes for transportation and importation for the convenience of the trade. They are primarily put in paper
29 boxes, the same as those that are exhibited here.

This paper is the invoice of goods marked O, A & D, Nos. 4836 and 4837. There are five styles of goods. They are invoiced at the price without boxes and packing, and afterwards, at the end of the invoice, the boxes and packing is added on this invoice. The price of the goods represents the goods without any boxes or anything. The figures for style 933 are M 4.10p.; style 942, M 5.30p.; style 936, M 4.50p.; style 954, M 6.15p.; style 957, M 6.15p., less three per cent. for cash. That represents the price of the goods without any packing and without cases and boxes and all that relates to boxing and packing. I bought these gloves that were imported in the boxes like Exhibit No. 3, and samples of which are marked Exhibits 10, 11, and 12, by the dozen. I only see one pair of them when I buy; I get many colors but I don't see any more than a list of samples and pick out one style and say I want a thousand dozen of that style; I don't see any boxes. I bought them fifty pfennig higher than those prices which are added afterwards for the charges and for the boxes. The manufacturer makes one price for the convenience of myself, that I need not figure on it afterwards in the trade. The clerks will make very much trouble if they have to figure two prices; so we have to have one price and, of course the price of the boxes are on it. I could have the goods without boxes fifty pfennig less; I could have the goods at this price (referring to the invoice) if I would not have the boxes; so the manufacturer puts the charges for the boxes on it at the end. The invoice
30 is the invoice of these goods. The amounts M 4.10p., M 5.30p., M 4.50p., M 6.15p., and again M 6.15p. are for the loose goods —for the loose gloves. I bought them loose. I didn't see any except one pair when I bought them. On this invoice they are invoiced loose. The charges specified in the invoice are M 25 for cases; M 220 for boxes, and M 5 for packing, making in all M 250. That is added to the price of the goods. The total is what I paid for the goods after they were put up, packed, and cased for shipment.

There is a usage existing at Chemnitz among merchants and

dealers in these goods as to the manner of putting the price for their goods, which depends upon whether the buyer is known and what way he usually gets his goods. The seller knows the usual way he wants to get his goods and puts the price accordingly, except the buyer says "I want them different;" if he wants them different than he usually gets them for years and years, the buyer says so. They are mostly always invoiced at a price including all these charges. Sometimes they are not, on account that the law said that we should deduct it, and instructions were given from here to deduct any charges; we did not know what charges they were for the boxing and packing on the goods, and we instructed from here to deduct any charges. The law told us we do not pay for boxes and we did not know what the boxes and packing and so on cost, and we left it to the manufacturer to take the cost off of the invoice. Of course, we know about the price. The usage is to buy at a price including the charges, but they are sometimes bought otherwise.

31 They give us the price, including cartons, for convenience sake; but at the same time there are many goods that we buy that they will ask us "Do we want them in cartons or not?" and some certain styles of goods are sometimes sold with cartons, and sometimes sold not in cartons, and those they ask you "Do you want cartons or not?" But, as a general rule, they understand you want cartons and they give you at once the price for cartons included, and you must state you do not want cartons.

I buy similar goods in England and France; there is a different rule with the manufacturers there; they always give you only the price for the loose goods, and charge extra for the boxes, cases, and packing and everything. If you want the price for the goods, the goods are always understood without cartons in France and England. There may be exceptions to that rule, but I never bought them any other way. In Germany you have to say if you don't want cartoons, while in England and France you have to say if you do want cartoons.

The invoice for cases O, A, & D, Nos. 4852 to 4872, is from Chemnitz also, and represents the styles originally contained partly in Exhibit No. 5 and partly in Exhibit No. 2 and partly in Exhibit No. 6; all three on the same invoice. It bills the goods in the same way as the last one; that is, that those prices are for the loose goods, and afterwards the charges for the boxes, cases, and packing added to it as a charge to the goods, and sums up the amount that I paid for the goods. The specification of the charges is correctly stated.

32 We buy the goods, as I say, at a price, and the manufacturer knows how much the boxes on the goods cost; we don't know that; we only know within ten or fifteen pfennig, perhaps; one style of goods costs more for the boxes than the other, but we know about the cost.

The invoice for the goods, marked $\frac{A\ C}{N,}$ case No. 168, is a copy of the invoice, and represents the numbers of goods stated on box No. 4 and box No. 1. The prices are figured for the full price of the manufacturer. This is the consignment shipment, and it represents

what the manufacturer wants for those goods, or would sell them at to me—the full price, with everything included, and deducts on the end the charges for the cases and for freight, and everything that is included already in this price, but he does not deduct the boxes on this invoice. After we received that it was written over to them that the custom-house would not allow the duty on the boxes *not* to be paid, and they were told that the custom-house does not allow the boxes any more; they deducted only for the charges and the freight and left the boxes off.

By DEFENDANT'S COUNSEL: Q. You mean that the price of the cartons is included in the price of the goods in that invoice?

A. Yes, sir; he did not take it off on the end, but only took off the casing and the packing and the freight, which is also included in the price of the goods as well as the cartons.

By PLAINTIFFS' COUNSEL: Q. There is also included the freight?

A. Freight, consul fees, insurance, and everything is covered by this price; he only wants to realize this price. By "this price" I mean M 10 for style No. 4966; M 8 for style No. 0; M 10 for
33 style No. 4966½; M 8 for style No. 00; M 8 for style No. 000; M 8.80p for style No. 824 08.

The division, marked Exhibit 3 A, in box Exhibit No. 3, is to keep the goods in half dozens each; this box would be a little smaller if they were in dozens. The wholesale trade don't sell half a dozen out of a box; but a dozen would not lie as good in the box as half a dozen in two divisions, and it is divided with a partition to make it more convenient to handle the dozen in two half dozens. It is for convenience in packing; they are all one style, but it is more convenient in selling and in handling the goods for the man who probably will sell them after the wholesaler has sold them. The trade likes to have it that way to give them all the convenience; it makes no difference to the glove in selling it to anybody.

And, being cross-examined by defendant's counsel, witness further testified:

By packing in boxes for the convenience of the trade, I mean, in the first place, if the goods would be sold, probably in a European market, they need no box; it is only for getting the goods over here and for handling the goods, in case that they do not get smashed, and also that we handle the goods better and can count the goods better, and it facilitates everybody when the goods are put up for transportation that way; also that the goods do not get spoiled; it is a cover for the goods, and nothing else. When goods like these samples are unpacked from the cases in which they come across the ocean we take out the cartons, and they are useful again for the
34 transportation of the goods until they reach probably the retailer, who will then afterwards deal them out to the customers who wear them; the same way as if we send to Chicago, and the goods are sold by the wholesaler and shipped again, and so the goods will be put up in cases until they are distributed among the retailers, who sell them to their customers. The retail-

ers do not care for the boxes, but it is only for the convenience of the trade that we send them to the wholesalers in cases and boxes so they can sell them to others, and the goods might be spoiled in carrying them around loose. That is the reason why. The retailer gets the goods in the boxes, and he sells the gloves, and he don't care for the boxes.. He may sell the last pair and throw the box away under the counter; or a customer may say: "You don't want that box; give it to me." It also facilitates counting. If we don't sell a whole case, but sell, say, twenty-five dozen or fifty dozen, it would take a long time to count the fifty dozen off; and when they are in cartons there you see the boxes, and can count them in a moment—a hundred dozen or fifty dozen. We don't sell fifty dozen or a hundred dozen in an original case, you know.

Cartons may in some way facilitate for the retail trade, because they can easier find the goods. They have got labels on, and they see the labels—so many gloves, and such and such styles—and you keep the styles all together in the box, and they don't get mixed up, and if they were loose there might be mistakes, and you would have to label a ticket probably on every pair; but in that
35 box they are labelled, and you know what is in the box, and if they were loose you would lose the control over the goods. It is the custom to keep them in the boxes until they get to the retailer, and he takes them out of the box and throws the box away.

I don't think, as a general rule, that the retailers in Germany have these gloves in cartoons; I think it will be too expensive for them to have cartons; I think the finer and better class of trade in the finer goods they would keep them in cartons, but for the common trade it would be too expensive. But here in this country we have cartons for everything; but, except for fine goods, I don't think in Germany they have cartons; it is only to hold the goods from damage that they have the boxes on them—that is to say, that the goods don't get any air on them, and it keeps the goods clean until they go to the consumers. I was in business in Germany twelve or fifteen years ago, and I used to handle lots of these goods, and I think, to make it more comfortable, they have some boxes—five dozen, say, in a box—and they have a place to put them in—empty in the cheap goods into a drawer, or some place like that; but I don't think they have any separate boxes to put them in in Germany; but it might be different now. I think they have the better class in boxes now, but not the cheap goods. In England and France the manufacturers come and buy German goods and get them loose and pack them themselves. They buy them loose and sell them for their own goods, and they always buy them loose. They buy them without boxes and sell them in boxes with different labels for their own manufacture; they sell them for English
36 manufacturers and French manufacturers, while they buy them in Germany.

I know nothing about the retail trade either of France or Germany or England at the times these goods were bought. I know the wholesale trade of Germany, England, and France as it relates

to this country, and I know the manufacturers of England and France buy goods at Chemnitz, and they buy lots of goods there, and they are bought without boxes. I suppose they keep about half the goods in boxes and half the goods in bundles. The most of the trade in England keeps about half the goods in boxes; they do not get the money for boxes extra; the American custom is to ask for boxes, but most of the customers of England and France want no boxes.

The wholesale dealers in selling stockings and gloves of this kind to the German dealers offer them for sale partly in cartons and partly in bundles. The finer the goods the more cartons, and the poorer or cheaper the goods the less cartons they take, for the boxes are expensive. I should say of goods like these probably nine-tenths are bundles without boxes.

The cartons of gloves and stockings in boxes are put into rough cases, lined with old-cloth or thick paper to prevent sea water from getting at them. If it is only a common quality of goods they [are] put in thick paper, and for the better quality, for the finer quality, of goods they put a lining of oil-cloth, so that they keep them from the air, so that they would not lose the color. In the German trade with France goods of this kind are usually not in cartons; the
37 American custom is to ask for boxes, but most of the customers of England and France want no boxes, the reason being that in France most retail dealers have them in bulk, and sell them right out of a piece of paper.

The device of a harp and a wreath on the cover of the box marked Exhibit No. 6 I don't really know about; but I think this this harp is used on all balbriggans; I that that is mostly used on boxes containing these goods, and that when most parties see it they take it to be balbriggan goods, but I don't understand exactly.

The label on the end of the box was there when the goods were imported. They are put on to classify the style, for the convenience that when we sell the goods we know what the contents of the box is, the number of dozens, and the size of the foot, and also describe the goods by name. There are such labels on all these boxes. It is customary with the German manufacturers in dealing in gloves and stockings to have boxes that have these labels on them for our convenience, because they know we need it and like it. If we do not tell the English and French they leave it off, and we have a great deal of trouble; they would put on simply in pencil, but we want it on simply for convenience for selling; we sell in just the same way, but it makes you so much more work if you do not have it on.

The rule that if gloves were ordered the seller would give you a price that covered all charges has prevailed in Germany ever since I have bought—about seven years.

I bought these goods loose—that is, without boxes; the
38 manfacturer does not show me the goods in the boxes, but just a sample of quality, and he says, "I will sell you that goods in these lengths for that price; in a longer glove, so much more." I don't see anything but the sample, and I give an order for so much goods at such a price, and I pick out a pair of the kind and quality and of the particular length that I want, for there are

very many different lengths in gloves. In hose I pick out my color combinations, and the manufacturer shows me a style, say cardinal hose of a certain quality, and I pick out pinks and blues and anything I want in assorted half-dozen colors; that is all that I know of the goods; I only see one pair. Then he gives you the price, which includes the whole charges and everything up to Bremen, or the port of shipment, whatever the port of shipment may be. It is the custom of the trade if I buy the goods that he has to give me the cartons too; but I know if I wanted them without cartons it is understood perfectly that I would tell him, and I would get the goods so much less; I could buy considerably less if I did not want cartons. The question of cartons is usually mentioned, when we give the order, in some way; it is said, dozen boxes or half-dozen boxes; or, you want green boxes or red boxes, or anything like that. In a case where nothing is said about cartons I would not regard it a good delivery if they came packed in bundles; I would say I wanted the goods at least sixty or seventy pfennig less; without the boxes I should ask to have the charge less.

In Germany, when gloves and stockings of the kind of these importations are sold by the wholesalers, or held for sale by the
39 wholesalers and not in cartons, they are in a loose condition; they are put up in bundles and tied up together with strings, or they might be without anything around them—quite loose. I have been in a place of a manufacturer and have seen those goods lying around in bundles just as they get them in from their workmen; they lie around piled up one bundle on another on the floor. Probably there are five dozen together tied with a string around them, and then another five dozen with no string around. As the bundles are sold to the purchasers or dealers they put paper around them and write on the number contained in the bundles; if it is five dozen they write it on. The expense of bundling and writing on the marks that are required to designate them is included in the price, whatever it may be; also the paper and cord.

Witness, being further examined by plaintiffs' counsel, testified as follows:

I have bought goods in that way—any English goods, not German goods; I have bought, but, of course, if they left them in paper and tied with cord, why then I would have got them still cheaper; but I don't remember the proportion I bought in that way as to the boxes. I bought them bare, or simply without boxes or paper or anything else.

And being further cross-examined by defendant's counsel:

The goods are either in cartons or in bundles. It depends on the country and what is wanted; it depends on the style of goods and the cost; some goods are wanted in one way, some in another. These goods are supposed to be always in boxes; but other
40 goods I can't say how they make them up. As I said before, they usually make them without cartons, and an English manufacturer when he goes to Germany and buys them he sells

them for their own manufacture and says they are English; they sell them for English goods, and they are made up without cartons or anything, and the manufacturers that buy them and sell them for English put on what they like, and that is the way they send no paper when they get them up for English goods. Those goods for America are mostly sold in boxes—nine-tenths of them, I should say; it depends on the trade; if a man wants them very cheap to sell them cheap, he might buy without the cartons, but usually it is not good for the trade to have them without cartons; it is so for the trade generally in the United States; in Germany those goods are mostly sold in bundles, in paper only, with labels on them.

The deposition of CART WINCKLER was then read in evidence in behalf of the plaintiff as follows:

I live in Chemnitz, in Saxony, Germany; am a member of the firm of Winckler & Company, of Leipsic and Chemnitz, shippers of these goods. We sell goods to the United States; manufacture about half of them and buy the rest from small factors, as we call them, around Chemnitz. The goods we purchase do not come to us in cartons; we buy nothing but the stockings; there is no string around the dozen or anything else. We buy the gloves just the same.

These invoices included in this entry in question from our
41 house, Winckler & Co., are of goods purchased from our house by Oberteuffer, Abegg & Daeniker; they state the true prices that they paid us for the gloves and stockings.

In the first invoice the entry at the bottom, "packing charges; M 25, 220, 5," being 25 marks for the large outside wooden box or case, 220 marks for the smaller boxes, and 5 marks for putting the cartons into the outside rough cases and for putting the outer wrapper or oilcloth around it, making altogether 250 marks, the amount they paid us.

On the other invoice the entry "charges for cases, boxes, and packing, &c., for 1,029 dozen one-dozen boxes at 50p.; 1,920 dozen half-dozen boxes at 60p.;" that is, 1,029 in one-dozen boxes, and 1,920 dozen in half-dozen boxes; the dozen boxes at 50p., and the half-dozen boxes at 60p. We do not manufacture the boxes, but buy them from the manufacturer of them; and whenever there is a carton we make a charge for it; we make no profit on them; our profit is for the stockings and gloves.

We sell goods to all the world. The American people are the only one country who buys the goods in boxes, or generally in boxes. If an American comes in my store and wants to buy goods I don't ask him if he wants them in boxes, because it is a well-known fact that he wants them in boxes, and I give him my price for box included; but to a German dealer or a Frenchman I give the price without the box. With Englishmen I always have to ask, because if the English buyers buy for home trade, then he takes them over

in boxes too, but I believe seventy or eighty per cent. of all
42 they buy is for their shipping trade; they want them to sell under their own name as English goods, and they buy them without anything, without bandage or anything.

Chemnitz is a large center of the stocking and glove trade, and what is true of our trade is true generally of the trade in Chemnitz, as to the matter of selling with boxes and without boxes.

Witness, being cross-examined by defendant's counsel, further testified:

We sell gloves and hosiery to all the world; an order from a Mexican merchant I would get by a letter, and, of course, if he did not write me anything about the cartons I would send them without the box. To Australia I would send them with boxes for the convenience of the trade. In sending them to South America it would depend on the goods; very cheap stuff they buy without boxes. Generally the countries where the climate is very hot and changing, as in the United States, they take boxes.

The factors from whom we purchase about half of our goods are little manufacturers in the neighborhood of Chemnitz, they have no real factories, but a man and his wife and three children, say, make them; they manufacture nothing but stockings and gloves; I will say I get an order from some man for 500 dozen, and I go to one factor and say: "I want from you twenty dozen or fifty dozen," and to another factor and say: "I want fifty dozen," and so on; and he comes in with a large basket and leaves his goods in the store. We buy from the small factors at less than our manufacturers' price,
and less than the market value; otherwise we would lose
43 money. The stockings with the silk clocks on the side are embroidered in our factory before sending them away.

By PLAINTIFFS' COUNSEL: Q. That is, those stockings with the silk embroidery on the side are done in your own factory?

A. Yes, sir.

Q. And not by the small factors?

A. No, sir; done by our own employees; by our girls.

(To defendant's counsel:)

Some stockings I have to get dyed, and I send them to the dyer, and he dyes them and sends them back to me, and I put them in boxes like the other ones. The small factors do not do the dyeing or embroidering in silk. Goods that are sent to Australia, and to Mexico, and to the United States, we generally pack in the same outside cases. We have some tin cases, and we put it in an outside case as in the other; it has first a tin lining. We sometimes send goods in them to Australia and Mexico, but not always; we sent some in the same way to the United States, but we never did it again because it cost too high a price.

By PLAINTIFFS' COUNSEL: Q. It is only the better goods that you send in tin linings?

A. Yes.

By DEFENDANT'S COUNSEL: Q. It depends on the market whether you put them in cartons?

A. Yes, sir; depends on the market. The use of the boxes is to the dealer, and not to protect the goods on the journey. The goods that come in rough cases, in bundles, and that are in cartons, are

unprotected from sea water and from other damage on the
44 voyage. We do nothing to these goods. The rough cases protect them from the sea water, but it depends on the guarantee. I don't want to take the risk.

By PLAINTIFFS' COUNSEL: Q. You put the goods up just as your particular customer wants it?

A. As they want it. If the American wanted them without boxes, in order to have them cheaper, then I would send them without boxes,

Q. If they wanted them done up in tin-foil you would do it?

A. Yes; quite as they like.

By DEFENDANT'S COUNSEL: Q. And you would charge more for it?

A. Yes; we would charge more.

By PLAINTIFFS' COUNSEL: Q. That is, you would charge whatever it cost to put up the goods the way they wanted them?

A. Yes.

Anybody can go and buy from these factors; sometimes we hear of Oberteuffer, Abegg & Co. buying from them, and we don't like it.

We sell goods like these samples, and where we do not pack them in cartons or in bundles, in outside casings to France; Mexico takes some; South America does not use exactly the same; when they do not take boxes they take those without anything at all, in order to have cheap hose—without any outside cases.

In the invoice "200 dozen ladies' brown balbriggan hose," the wholesale price or actual market value per dozen would be four marks and thirty pfennig, without the boxes; if the order was given without saying anything about the boxes, I would have spoken about
45 them, because I don't know whether they want only the goods or whether they want the box too. The Americans mostly always want to buy with boxes. But we know all of our customers; for instance, E. S. Jaffray, and Arnold and Constable, they buy the goods and they come every season to me and want some special marks or something on the boxes, and then I know it; but if there comes a new house I don't know, and then, of course, I ask them which kind of putting up they want, because we have sold a great many goods to the United States without boxes. If I know he wants boxes, then I give him the cheapest box I can. But mostly they say "I want this color;" or, "I want this color," and they have special boxes; we make no profit on the boxes; when, for instance, I sold a large bill with boxes to Dent and Co., the largest glove house in London, and the rule was in England that we always, like here, deduct with box or not, and after a fortnight about, they cancel the order with box and order without boxes, and I had to reduce the price by six pence; and if there was a profit in it then I would lose the profit.

Q. I wish you would dictate to the stenographer the form of one of your price-lists, such as you send to the United States.

A. I could show a price-list in the copy-book. I came here myself, and so I could see everybody myself; but I wrote to Philadelphia and Baltimore letters, in which I enclosed a glove and said: "I could

give you a glove at so much, a box and case and putting up included in price."

Q. Dictate, please, the form of your price-list as it was at the time these goods were shipped.

A. "Charges for cases, boxes, putting up, and so forth, in-
46 cluded in the price."

Q. That is so of your American price-list?

A. Yes, sir.

Q. Did you have any different ones?

A. Yes; some different, because in all these other countries we have agents; in all these different countries we have agents, and they have got a special price-list, because we have to pay the commission to these people; it depends on the terms.

Witness, being further examined by plaintiffs' counsel, testified:

The price-list does not include the cost of transportation, because in large houses, where they come over there, they want to get out of us all they can; but when we write in a letter, if we don't mention free to Hamburg, we don't send it free, but houses like Oberteuffer & Abegg we have to send free.

And, by defendant's counsel, further testified:

We sell goods of the character of these samples here to retail dealers in Germany, mostly only in the outside case, not bundled or anything at all, especially in such goods of this cheap character. Of course, in a pure silk glove at so many dollars, of course that takes a box; but that is a special thing.

WILLIAM P. MCPHERSON, being duly sworn and examined as a witness for the plaintiffs, testified:

I am examiner in the appraisers' department, and have been such about eight years. I examine hosiery and underwear. The invoice of twenty-one cases of hosiery I have seen before. I examined
47 two cases out of the whole number on the invoice. The red ink upon the invoice is in my handwriting, and is the classification of the goods and rate of duty, return as to the value.

Q. Please read that writing at the bottom.

A. Add R'm 1,246.50, less discount, to make market value in marketable condition.

Q. What was that addition made to cover?

Counsel for the Government: I object to that on the ground that the paper shows for itself; also, that it is irrelevant, incompetent, and immaterial. It is not competent by way of explanation, and the document is not ambiguous.

PLAINTIFF'S COUNSEL: I ask him to state what it means.

Counsel for the Government: I think it means add so much to the value of these goods as invoiced and entered.

The COURT: I do not think I should understand it without some evidence to show. I think it is competent.

A. It was to cover the boxes.

Q. What do you mean by that?

The same objection, ruling, and exceptions.

A. That addition is to cover the boxes, similar to what you have in your hand at the present time (pointing to a carton.) It is for the boxes and for the boxes only.

Q. Look at the paper and see whether it is not packing also.

A. Well, that includes——.

Q. In other words, it is made to cover these two items stated at the end of the invoice as charges—420 for boxes and 42 for packing?

A. Yes, sir.

By Mr. Root: You mean the packing in those boxes?

A. Yes, sir.

48 Q. Not the packing of those boxes in large cases?

A. That I understand to be such.

By Plaintiffs' Counsel: Q. Will you look at the other invoice for the thirty-six or thirty-seven cases; what did you return on that invoice?

A. That is under the same conditions as this first invoice.

By Defendant's Counsel: Q. Answer the question.

A. Oh, it is for the boxes and packing.

Q. No; that is not the question. He asked what the return was.

A. I don't quite understand it.

By Plaintiffs' Counsel: Q. Look at the invoice for the thirty-six or thirty-seven cases. Now, the question is what did you return on that invoice?

A. I said in my return: "Add R'm 225, less importer's discount, to make market value in marketable condition."

Q. What does that return mean?

The same objection, ruling, and exception.

A. That is for the boxes and packing.

Q. Is that the boxes and packing noted on that invoice?

A. Yes, sir.

Q. R'm 220 for boxes?

A. 220 for boxes and five for packing.

Q. Now, I hand you invoice of case No. 168; state your return on that invoice.

A. "Addition—30 pfennig per dozen net to make market value in marketable condition."

Q. What does that mean?

The same objection, ruling, and exception.

A. That is for the boxes and packing.

Q. You mean the cartons—boxes like these green paste-

49 board boxes that are exhibits in this case?

A. Yes, sir; boxes like those.

By the Court: Q. How do you ascertain the amount?

A. We estimate it at about 30 pfennig per dozen.

Q. You made an estimate of the cost of the cartons?
A. Yes, sir; of the cartons—not of the boxes.

By PLAINTIFFS' COUNSEL: Q. A carton for a dozen of the stockings would cost 30 pfennig?
A. Yes, sir.

By Mr. ROOT: Q. That is, on two of these invoices the actual cost was indicated, and you took that as a basis of your estimate?
A. Yes, sir.
Q. On the third you arrive at your estimate from other sources?
A. From other sources; yes, sir.

By PLAINTIFFS' COUNSEL: Q. Are those put up in dozen or half-dozen boxes?
A. From the invoices I should say half-dozen boxes. Possibly the women's brown hose might have been in dozens.
Q. And the kind of boxes all those goods were cased in you estimated to cost 30 pfennig for each dozen of the goods?
A. Yes, sir; 30 pfennig for each dozen of the goods.
Q. That invoice shows no statement of cost of cartons?
A. No, sir.
Q. You didn't know whether that price included cartons or not?
A. No, sir.
Q. But under your instructions you added the cost of cartons?
A. Under our instructions we were ordered to add where it did not say included in the price of the goods.

50 And being cross-examined by counsel for the Government, witness further testified:

Q. Who gave you those instructions?
A. It was, I believe, Secretary Sherman at the time, originally.
Q. Secretary Sherman?
A. I think it was; yes, sir; and then the appraiser of the port of New York afterwards.
Q. That was your way of getting at the market value in marketable condition?
A. That was it, only to place it that way.
Q. You understand that the value, with the addition that you indicated, was the market value of that article imported in that invoice in its marketable condition?
A. Yes, sir.
Q. What did you consider the thing for you to pass upon; was it the gloves or the stockings, or was it the stockings as arranged in the cartons that you were to appraise and find the market value of?
A. The stockings themselves and the gloves themselves.
Q. Without the cartons?
A. Yes, sir; because I haven't come to that yet.

By PLAINTIFFS' COUNSEL: Q. In the summer of 1883 you were acting under that general Treasury circular, dated May 15, 1883, numbered 5,706?
A. Yes, sir.

By COUNSEL for the Government: Q. Was that Secretary Sherman's authority that you referred to?

A. That was the one that was in force; this was later than Secretary Sherman's, but Secretary Sherman's was the one very similar to that.

51 EDWIN A. PERRY, being duly sworn and examined as a witness in behalf of the plaintiffs, testified:

I am an entry clerk in the New York custom-house; was amendment clerk or liquidator before, since 1866. Before I had anything to do with the papers as amendment clerk or liquidator, they had already been before the entry clerk, and from there transferred to the appraisers' department; the appraisers had made a report upon the invoice, and then the invoice was brought, together with the entry, and turned over to me to liquidate. I had to make up the figures—the estimates of duty upon the amended reports of the appraisers as they assessed upon the invoices. In liquidating the entry in one of these invoices I should take the amount of the invoice as it appeared by the entry clerk's stamp; the entry clerk's stamp says R'm 14,741.25; less case, &c., R'm 1,616.50; the appraiser classified the invoice, stating what the goods were—stating that they were cotton hosiery, and paid the rate of duty of 40 per cent.; the appraiser also adds R'm 1,246.50, less discount to make market value in marketable condition. I would add to the difference between R'm 14,741.25 and the R'm 1,616.50 deducted, the R'm 1,246.50; I would add the R'm 1,246.50, less the discount, which is three per cent.; I would then reduce that to dollars and make the computation of duty at 40 per cent., which would give the duty. I would compute the duty, including the addition, if the addition was stated by the appraiser.

PLAINTIFFS' COUNSEL: Under the act of 1874, wherever the
52 appraiser has added M 225 for charges, for instance, the liquidator would assess duties upon M 450, under the act of 1874, and during all that time wherever the duties appeared upon the invoice to be for cartons, I offer to show the duties upon them were liquidated in that way.

That is what I propose to show.

The COURT: That I suppose is intended to meet the suggestion contained in the circular of the Secretary of the Treasury.

PLAINTIFFS' COUNSEL: Yes, and to show what would be taken as the meaning of the act of Congress. In various cases other than those which my friends on the other side have before them on the table, and in the familiar one in the mousseline delaine, and in one of Dodge *vs.* Collector, and in all that class of cases, the distinct reference is made to the practice in the Treasury Department and in the custom-house, and in construing the law the Supreme Court of the United States have constantly referred to the practice of the Department, which has been followed for years, as being the law.

The COURT: How is that to be proved? Is it to be proved by anything else than the regulations and instructions of the Depart-

ment? Can you put on any subordinate from any custom-house in the country and ask him the practice in that custom-house?

COUNSEL FOR PLAINTIFFS: I presume that if we show what he does it will be presumed that he is doing his official duty. We have already shown the regulations.

The COURT: As this is not everything which can by any possibility affect the considertion of the case with the jury, I am in-
53 clined to let the evidence in and let it go for what it may be worth.

The Government excepts.

Plaintiffs' counsel then puts the question in the following form:

Q. Prior to March 3, 1883, and after June 22, 1874, what was the practice of the custom-house where it appeared that cartons embraced within the invoice and omitted upon the invoice and the entry and where the value was added by the appraiser—how was the duty upon those cartons liquidated?

Objected to as immaterial. Objection overruled. The Government excepts.

A. Where the charges were included in the invoice but omitted from the entry and subsequently added by the appraiser, duty was taken on them without a penalty?

Q. Yes; but that is where they were stated in the invoice?

A. Yes, sir.

Q. But my question is, where cartons were actually with the goods, but not stated on the invoice.

A. Not stated by the invoice, but added by the appraiser—then a penalty of one hundred per cent. upon their value was added and the duty taken at twice the value added by the appraiser.

Q. That was the uniform practice during that time?

A. Yes, sir.

Both parties thereupon rested.

Defendant's counsel then moved the court to direct a verdict for defendant on the ground that the plaintiffs had not made out a case.

54 The court thereupon granted said motion and directed the jury to find a verdict for the defendant.

To which ruling and direction counsel for plaintiffs then and there duly excepted.

The jury thereupon found a verdict for the defendant under the direction of the court, and inasmuch as none of said exceptions so offered and made appear upon the records of said trial, therefore, on the prayer of the plaintiffs, by their counsel, the said judge has signed and sealed this bill of exceptions *nunc pro tunc*, as of the 13th day of May, 1884.

WM. J. WALLACE.

55 [Endorsed:] U. S. circuit court, so. dist. of N. Y. Reece M. Oberteuffer & o'rs *vs.* Wm. H. Robertson. Bill of exceptions.

Stanley, Clarke & Smith, attorneys for plaintiffs, No. 160 Broadway, N. Y. city. U. S. circuit court. Filed Oct. 21, 1885. Timothy Griffith, clerk.

56 United States Supreme Court.

REECE M. OBERTEUFFER, HENRY ABEGG, and HENRY H. DAENIKER, Plaintiffs in Error,
against
WILLIAM H. ROBERTSON, Defendant in Error.

Afterwards, to wit, on the third Monday of October term, 1885, before the justices of the said court, at the Capitol, in Washington, comes the said plaintiffs in error, by Stanley, Clarke & Smith, their attorneys, and say that in the record and proceedings aforesaid there is manifest error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendant in error against the said plaintiffs in error, whereas, by the law of the land, the said judgment ought to have been given for the said plaintiffs against the said defendant.

2. That the judge erred in directing a verdict for the defendant.

3. That there was error in refusing to direct a verdict for the plaintiffs.

57 4. The plaintiffs in error assign for error the several pleadings, instructions, and refusals to instruct which were by them made on ground of exception upon the trial, as by the bill of exceptions in this record appears.

And the said plaintiffs pray that the judgment aforesaid for the error aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that they, the said plaintiffs, may be restored to all things which they have lost by occasion of said judgment, &c., &c.

STANLEY, CLARKE & SMITH,
Attorneys for Plaintiffs in Error.

(Endorsed:) U. S. Supreme Court. Reece M. Oberteuffer, Henry Abegg, and Henry H. Daeniker, plaintiffs in error, against William H. Robinson, defendant in error. Assignment of error. Stanley, Clarke & Smith, attorneys for plaintiffs in error, No. 160 Broadway, N. Y. city. Due service of a copy of the within is hereby admitted. N. Y., Oct. 2, 1885. William Dorsheimer, attorney for def't
58 in error. U. S. circuit court. Filed Oct. 23d, 1885. Timothy Griffith, clerk.

59 *Joiner in Error.*

Supreme Court of the United States.

REECE M. OBERTEUFFER, HENRY ABEGG, & HENRY H. DAENIKER, Plaintiffs in Error,
vs.
WILLIAM H. ROBERTSON, Defendant in Error.

And afterwards, to wit, on the third Monday of October term,

1885, the said defendant in error, by William Dorsheimer, his attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

WILLIAM DORSHEIMER,
Attorney for Defendant in Error.

(Endorsed:) U. S. Supreme Court. Reece M. Oberteuffer
60 & *al.*, plaintiffs in error, *versus* William H. Robertson, defendant in error. Joinder in error. William Dorsheimer, United States attorney, attorney for defendant in error Due service of a copy of the within is hereby admitted. New York, October 2, 1885. Stanley, Clarke & Smith, for Chas. Curie, attorneys for plaintiffs in error. To Charles Curie, attorney for plaintiffs. U. S. circuit court. Filed Oct. 23, 1885. Timothy Griffith, clerk.

61 *Bond for Damages and Costs.*

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

REECE M. OBERTEUFFER *et al.*
vs.
WILLIAM H. ROBERTSON, Collector.

Know all men by these presents that we, Julius Binge, of the city & State of New York, and James T. Drummond, of Lakeview, Passaic county, and State of New Jersey, are held and firmly bound unto the above-named William H. Robertson, collector, in the sum of two hundred and fifty dollars, to be paid to the said William H. Robertson, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 22nd day of October, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas the above-named Reece M. Oberteuffer *et al.* have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Reece M. Oberteuffer *et al.* shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make their said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JULIUS BINGE. [L. S.]
JAMES T. DRUMMOND. [L. S.]

Sealed and delivered and taken and acknowledged this 22nd day of October, 1885, before me.

[L. S.]

M. J. BINGE,
Notary Public, N. Y. C., No. 134.

62 UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

Julius Binge and James T. Drummond, both being duly sworn, each deposes and says for himself that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

JULIUS BINGE.
JAMES T. DRUMMOND.

Sworn to this twenty-second day of October, A. D. 1885, before me.

M. J. BINGE,
Notary Public, N. Y. C., No. 134.

The within bond hereby approved as to form, amount, and sufficiency of the sureties.

WM. J. WALLACE, *Judge.*

[Endorsed:] U. S. circuit court. Reece M. Oberteuffer *et al. vs.* William H. Robertson. Bond for costs on writ of error. Stanley, Clarke & Smith, att'ys for pl'ff in error. U. S. circuit court. Filed Oct. 23, 1885. Timothy Griffith, clerk.

63 UNITED STATES OF AMERICA, *ss:*

To William H. Robertson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the third Monday of October term, eighteen hundred and eighty-five, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Reece M. Oberteuffer, Henry Abegg, and Henry H. Daeniker are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated October 2, 1885.

WM. J. WALLACE.

64 [Endorsed:] 9055. U. S. Supreme Court. Reece M. Oberteuffer *et al.*, plaintiffs in error, against William H. Robertson, defendant in error. Citation. Stanley, Clarke & Smith, attorneys for plaintiffs in error, 160 B'dway, N. Y. Due service of a copy of the within admitted Oct. 2, 1885. William Dorsheimer, attorney for def't in error. [Stamped:] U. S. circuit court. Oct. 23, 1885. Timothy Griffith, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 1192. Reece M. Oberteuffer *et al.*, plaintiffs in error, *vs.* William H. Robertson, collector of the port of New York. Filed October 31, 1885.

116-499

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1885.

No. 1192.

REECE M. OBERTEUFFER et al.,

Plaintiffs in Error,

vs.

WILLIAM H. ROBERTSON, Collector, &c.,

Defendant in Error.

PLAINTIFFS' BRIEF.

CHARLES CURIE,

44 EXCHANGE PLACE,

Attorney for Plaintiffs.

EDWIN B. SMITH,

STEPHEN G. CLARKE,

WILLIAM STANLEY,

Of Counsel.

C. G. BURGOYNE'S "Quick" Print, 146-150 Centre Street, N. Y.

IN THE

Supreme Court of the United States.

ERROR TO THE CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

REECE M. OBERTEUFFER ET AL.,
Plaintiffs in Error,

AGAINST

WM. H. ROBERTSON, Collector, &c.,
Defendant in Error.

No. 1192.

BRIEF IN BEHALF OF PLAINTIFFS.

Statement.

This suit was brought to recover duties exacted upon the value of paper boxes in which stockings and gloves were imported, and on the cost of putting up and packing them.

July 23, 1883, the plaintiff-firm, Oberteuffer, Abegg & Daeniker, received at New York, per steamer Werra, from Hamburg, two cases of woolen gloves and twenty-two cases of cotton hosiery, entered by them upon three invoices; the first covering the gloves, the second twenty-one cases of hosiery, and the third a single case of the hosiery (Record p. 9).

In the two first-mentioned invoices the value of the articles themselves was given, followed by a statement

of the "charges" for packing and coverings. *Ex. gr.*, —"Packing charges, for cases, M. 25; boxes, M. 220; packing, M. 5; total packing charges, M. 250." (Record p. 12, middle.) The appraiser, under general instructions from the Treasury Department, added to the entered value, the cost of the boxes and packing—225 Marks—"to make market value *in marketable condition*." (Record, p. 13, p. 18, bottom.)

In the third invoice a gross sum was stated, which, in fact, covered the value, of the goods, cartons and packing, but the cost of the cartons was not stated to be included in the price of the merchandise. To the entered value the appraiser added 30 pfennig per dozen "to make market value *in marketable condition*," as in the former instances. (Record, p. 13, p. 18, bottom.)

The employee in the appraiser's office, by whose hand the directions of his superiors were actually carried into effect, testified that the endorsement upon the invoice of twenty-one cases,—viz., "add Rm. 1246.50, less discount to make market value in marketable condition"—was made by him "to cover the boxes" or cartons (as he indicated by pointing them out) and, the packing of the goods in those cartons; and that the appraiser's return upon the other invoices intended the same thing;—to include the cost of the cartons, and the cost of putting the stockings and gloves into them, as part of the market value of the goods when thus put into "marketable condition." Upon the invoices which stated the cost of the cartons, that statement was accepted, in making the addition; where it was not stated, (as this witness testified) he estimated it to be "thirty pfennig per dozen."

He further testified that this addition was made to the value as given in the invoices, which did not specifically state the cost of boxes, as a separate item —or distinctly say that their price was included in the value of the goods—without his really knowing whether or not their cost had, in fact, been included by the im-

porter in fixing the invoice value of the goods. This course, he said, was pursued under the instructions of the Secretary of the Treasury; replying thus to the first cross-question of the District Attorney; "Under our instructions, we were ordered to add where it did not say included in the cost of the goods;" the instructions being those contained in Treasury circular of May 15, 1883, No. 5706. (Record, pp. 25–28.)

Against these additions, and the exaction of duty upon the amount thus obtained, the plaintiffs seasonably protested, and have taken all the requisite preliminary statutory steps to entitle them to bring this action (Record, p. 15). The protest is set out in the record, commencing at the bottom of p. 13.

It in substance claims that the addition of the cost of cartons and packing to make dutiable value was unwarranted by law and contrary to section 7 of the act of March 3, 1883.

This section reads:

"SEC. 7. That sections twenty-nine hundred and seven and twenty-nine hundred and eight of the Revised Statutes of the United States, and section fourteen of the act entitled, "An Act to amend the customs revenue laws and to repeal moieties," approved June twenty-second, eighteen hundred and seventy-four, be and the same are hereby repealed, and hereafter none of the charges imposed by said sections, *or any other provisions of existing law*, shall be estimated in ascertaining the value of goods to be imported, *nor shall the value of the usual and necessary sacks, crates, boxes or covering* of *any* kind be estimated as part of their value in determining the amount of duties for which they are liable:

Provided, that if any packages, sacks, crates, boxes or coverings of any kind shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the *bona fide* transportation of goods to the United States, the same shall be subject to a duty of one hundred per centum *ad volorem* upon the actual value of the same" (22 Stats., 523).

An employee of the plaintiffs, a buyer of this class of goods, and who actually purchased the two first invoices, testified that plaintiffs' goods were bought loose on samples seen by him (Record, p. 15, middle p. 17). That he saw no boxes (*Ib.*). That a difference of fifty pfennig per dozen is made between such goods delivered loose and delivered in cartons; that the latter sum is the cost of the cartons (Record, p. 17). That in Germany gloves and hosiery are in a finished and marketable condition when loose, and that plaintiffs' goods were actually so bought (Record, foot of p. 17). That Americans preferred that the gloves be put up and packed for shipment in cartons, because, so put up, they bear transportation better; do not get "mashed" (*Ib.*, p. 19), or "spoiled." The cartons "keep them from the air" (*Ib.*, middle of p. 20). "Keep them clean" (*Ib.*). The boxes keep them from getting wrinkled and rumpled, and facilitate the counting the goods, and are convenient for everybody (*Ib.*, p. 19).

This witness further testified that two invoices (Exhibits B and C, pp. 9–12, Record) were purchased goods, and the other invoice (Exhibit D, p. 13) consigned goods. That Chemnitz is the centre and principal market of the hosiery trade in Germany (Record, p. 15). That the prices in Exhibits B and C represented the prices paid for the goods themselves, without any packing, and without cases and boxes and all that relates to boxing and packing (*Ib.*, 17, middle).

The usage in Germany is to buy at a price, for convenience, including everything, but not always.

In England and France there is a different rule. "They always give you only the price for the loose goods, and charge extra for the boxes, cases and packing and everything. If you want the price for the goods, the goods are always understood without cartons in France and England."

"In Germany you have to say if you don't want car-

tons, while in England and France you have to say if you do" (*Ib.*, p. 18, middle).

"The invoice for the goods, marked $\frac{A.C.}{N.}$, case No. 168, is a copy of the invoice (Exhibit D, p. 13) and represents the numbers of goods stated on box No. 4 and box No. 1. The prices are figured for the full price of the manufacturer. This is the consignment shipment, and it represents what the manufacturer wants for those goods, or would sell them at to me—the full price, with everything included—and deducts on the end the charges for the cases and for freight, and everything that is included already in this price, but he does not deduct the boxes on this invoice.

"By Defendant's Counsel: Q. You mean that the price of the cartons is included in the price of the goods in that invoice?

"A. Yes, sir; he did not take it off on the end, but only took off the casing and the packing and the freight, which is also included in the price of the goods as well as the cartons.

"By Plaintiffs' Counsel: Q. There is also included the freight?

"A. *Freight, Consul fees, insurance, and everything is covered by this price; he only wants to realize this price*" (Record, pp. 18, bottom; 19, top).

In other words, the invoice for the one case of consigned goods (Exhibit D, p. 13) showed the price of the goods laid down in New York, to wit, the price which the consignor was willing to accept for them delivered in New York, and included the charges for paper boxes, packing, cases, transportation to Bremen, ocean freight, insurance and Consul fees. All the above charges, except for the paper boxes and packing, were separately specified on the invoice, and the cost of the paper boxes and packing, as well as the above charges, was included in the invoice price of the goods.

One of the sellers of the goods covered by Exhibits B and C, testified:

"I live in Chemnitz, in Saxony, Germany; am a member of the firm of Winckler & Company, of Leipsic and

Chemnitz, shippers of these goods. We sell goods to the United States; manufacture about half of them and buy the rest from small factors, as we call them, around Chemnitz. The goods we purchase do not come to us in cartons; *we buy nothing but the stockings;* there is no string around the dozen or anything else. We buy the gloves just the same.

These invoices included in this entry in question from our house, Winckler & Co., are of goods purchased from our house by Oberteuffer, Abegg & Daeniker; *they state the true prices that they paid us for the gloves and stockings.*

In the first invoice the entry at the bottom, "Packing charges"; M. 25, 220, 5, "being 25 marks for the large outside wooden box or case, 220 marks for the smaller boxes, and 5 marks for putting the cartons into the outside rough cases and for putting the outer wrapper or oilcloth around it, making altogether 250 marks, the amount they paid us."

On the other invoice the entry "charges for cases, boxes, and packing," &c., for 1,029 dozen one-dozen boxes at 50p.; 1,920 dozen half-dozen boxes at 60p.; that is, 1,029 in one-dozen boxes, and 1,920 dozen in half-dozen boxes; the dozen boxes at 50p., and the half-dozen boxes at 60p. We do not manufacture the boxes, but buy them from the manufacturer of them; and whenever there is a carton we make a charge for it; we make no profit on them; our profit is for the stockings and gloves.

We sell goods to all the world. *The American people are the only one country who buys the goods in boxes, or generally in boxes.* If an American comes in my store and wants to buy goods, I don't ask him if he wants them in boxes, because it is a well-known fact that he wants them in boxes, and I give him my price for box included; but *to a German dealer or a Frenchman I give the price without the box.* With Englishmen I always have to ask, because if the English

buyers buy for home trade, then he takes them over in boxes too, but I believe seventy or eighty per cent. of all they buy is for their shipping trade; they want them to sell under their own name as English goods, and *they buy them without anything, without bandage or anything.*

Chemnitz is a large centre of the stocking and glove trade, and what is true of our trade is true generally of the trade in Chemnitz, as to the matter of selling with boxes and without boxes (Record, p. 24).

The entry at p. 9 of record shows that invoices B and C were entered at the price of the goods without including cost of packing-cases or cartons.

Exhibit D, by the same entry, appears to have been entered at the invoice amount, deducting for case, freight, consul fees and insurance, but without any deduction for cartons, the cost of which, as well as freight, &c., were included in price of the goods as stated in invoice (Record, p. 13 and p. 19 middle).

On the first two invoices the collector, following the addition of the appraiser, assessed duty upon the cost of the cartons and packing as stated in the invoices, and on the third invoice he assessed duty at 40 % on 30 pfenning per dozen additional for cost of cartons, already included in invoice price and not deducted on entry. The appraiser following in making the addition, the regulations in force before 1883. (Record, p. 13, and p. 28, middle. See Regulations in Appendix B, No. 3735.)

Prior to the passage of the act of 1883, always after June 22, 1874, at the Custom House, cartons when with the goods and not stated on the invoice, and their cost added by the appraiser, were treated as a charge under section 14, act of 1874, and a penalty of one hundred per cent. added in liquidation (Record, p. 30).

At the close of the plaintiff's testimony, none being introduced in behalf of the defendant, counsel for defendant moved the Court to direct a verdict for de-

fendant, which motion the Court granted (Record, p. 30).

The substance of plaintiff's claim is that the defendant assessed and exacted duty upon plaintiff's goods at a value ascertained by including charges for putting up, preparing and packing them for shipment, and by including the charges for the cost of the cartons in which they were contained, these goods being put up, prepared and packed in cartons and then in cases in the manner and form usual and necessary for shipment to the United States, according to the usage and universal custom of trade existing long prior to and on the 3d day of March, 1883, and ever since. In respect to the third invoice that an addition was made for cartons already included in the entered value. That thus a dutiable value in excess of actual market value of the goods was arrived at by adding to the market value of the merchandise itself, charges as elements of value, which the Act of 1883 said should not thereafter be added.

Assignment of Errors.

Plaintiffs assign for error:

1st. That judgment was given for defendant in error (Record, 7–8, 30, fols. 53 and 54).

2d. That the Judge erred in directing a verdict for defendant (Rec., 30, fols. 53 and 54).

3d. That the cause should have been submitted to the jury to find the facts, without directions as to which party was entitled to their verdict, except as such verdict should follow and depend upon the jury's determination of the facts.

POINTS.

From the earliest legislation upon this subject to the latest our tariffs have been substantially based upon the *ad valorem* system ; purely specific duties being comparatively few and exceptional ; and where imposed largely upon crude materials.

Manufactured articles, the products of the loom and the spindle, have almost (if not quite) universally been subjected to *ad valorem* duties.

Necessarily, then, when imported articles are to pay such duties, the first thing to be done is to establish the *method* of determining value ; to lay down the principles which are to govern the action of those whose function it is to ascertain the valuation upon which the proper percentage of duty is to be assessed.

This ascertainment is the work of the government appraisers—who, in this particular, resemble a jury. But this function, like that of a jury, is to be exercised in subordination to fixed rules of law.

A result legally correct can only be reached through the application of correct legal principles.

Only those principles are legally correct and to be followed, in this matter, which Congress has prescribed as the rule of action.

Between the fourth day of July, 1789, and the third day of March, 1883, the principles and basis of valuation have been very many times changed, as will be seen by reference to synoptical statement of legislation made as an appendix to this brief. (Appendix A.)

Reference to the debates will show these changes to have been neither casual nor inconsiderate.

Whether the valuation should be home or foreign ; and, if foreign, of what elements it should be made up ; were points upon which Messrs. Calhoun and Clay, and their respective adherents, found themselves at issue.

2 Clay's Life and Speeches (Mallory), 123, 543–5.

The existing rule is prescribed by Rev. Sts.,

"Sec. 2906. When an ad-valorem rate of duty is imposed on any imported merchandise, or when the duty imposed shall be regulated by, or directed to be estimated or based upon, the value of the square yard, or of any specified quantity or parcel of such merchandise, the collector within whose district the same shall be imported or entered shall cause the actual market value, or *wholesale* price thereof, at the period of the exportation to the United States, in the principal markets of the country from which the same has been imported, to be appraised, and such appraised value shall be considered the value upon which duty shall be assessed."

This is a reproduction of the act of March 3, 1865, c. 80, § 7. (13 Stats., 493, bot.) That section (§ 7) contained further provisions not pertinent to the subject now under discussion, and concluded with a proviso forbidding the assessment of duties upon any of those items which make up what are known as 'charges' upon goods, and repealing the statutes which permitted it. (*Id.*, 594.)

Thus, it is seen, R. S., Sec. 2906, is merely the incorporation into the revision of *part* of a statute which forbade the assessment of duties upon 'charges'; or upon anything except the wholesale price of the square yard or other denomination or measure of the merchandise itself.

The act of July 28, 1866, c. 298, § 9, restored these charges; requiring the addition to the actual wholesale price or *general* market value, of the cost of putting the goods on shipboard; "the value of the sack, box, or covering *of any kind* in which such goods are contained; commission at the usual rates, but in no case less than $2\frac{1}{2}\%$; brokerage, export duty, and *all* OTHER *actual* OR *usual* CHARGES for *putting up*, preparing *and* packing for transportation or shipment." (14 Stats., 330.)

Further directions are given for distributing charges

of a general character among the invoiced articles, etc. (*Ib.*)

The foregoing provisions became Sec. 2,907 of R. S. The residue of this § 9 of the act of July 28, 1866, was thrown into R. S., Sec. 2,908.

Both sections 2907 and 2908 of the R. S. are *expressly* repealed by the seventh section of the act of March 3, 1883, c. 121, which further declares that "hereafter none of the charges imposed by said sections or *any other* provisions of existing law shall be estimated in ascertaining the value of goods to be imported, *nor* shall the value of the usual and necessary sacks, crates, boxes, or covering, OF ANY KIND be estimated as part of their value in determining the amount of duties for which they are liable." (22 Stats., 523.)

So Rev. Stats., Sec. 2906, remains the directory act to guide the appraisers in making their determination; with this important qualification—that neither that nor "any other provisions of existing law" shall be deemed to authorize treating the "boxes, or coverings, of any kind," as part of the dutiable value of goods. The standard of value is thus fixed by this section, so qualified and construed.

I.

Turning to our appendix (A) of the Statutes, it will be found that the act of June 30, 1842, c. 270, § 16, first fixes the principal market as the *place*, and the act of March 3, 1851, c. 38, § 1, the period of exportation as the *time*, of valuation. (5 Stats., 563; 9 Stats., 629, 630.)

Stairs v. Peaslee, 18 How., 521, 525.
Sampson v. Same, 20 *Id.*, 578-9.

Now, what is *the thing* of which the appraisers are to ascertain the value, at a time past and place remote? that is the question in this case.

It is "such merchandise" as is then sold at wholesale in those markets. If sold by linear measure, it is the wholesale price of it there by the yard. If sold by the ton or dozen, it is the wholesale price of it there, at the given time, by the ton or dozen.

The inquiry is not, how and for what price was this *identical* fabric or article sold; (as it used to be, years ago, in 1795, 2 Story, 422, top.), whether by quantity, numeration or measure; or without regard to either, and for lump sum: it is, what was then and there the fair, general, wholesale, market price of "*such* merchandise"—goods of that general classification and character by the square yard, or number, or however there sold at wholesale.

R. S. "Sec. 2952. The words 'value' and 'valued,' used in this chapter, shall be construed as meaning the true market value of merchandise in the principal markets of the country from whence exported at the date of exportation."

These provisions of law would seem sufficiently to denote the time, place, and circumstances that are to be considered; to give a clear and easily-applied rule. When trouble in its application has arisen, it has always been traceable to an effort on the part of the administrative officers of the customs to so construe the law as to secure from any importation the largest possible pecuniary results to the treasury, regardless of the real intention of Congress, and even where it has declared its purpose to reduce taxation and revenue; instead of giving to statutory language its ordinary and obvious meaning, leaving the effect to be considered and remedied by Congress, if it see cause.

Marriott vs. Brune, 9 How., 635.

"The actual market value" in the principal markets, &c., must mean the *actual* value in the *actual* market, at the date designated (2 Ben., 267, bottom); not what this individual purchaser paid (2 Story, 429); nor considering whether the market was exalted or depressed, by temporary causes, above or below the usual cost or price of the goods at other times. What the thing was *then* worth in the market, *delivered there*, is the "actual market-value or wholesale price thereof" at the period of exportation. The *actual* market-value of a thing *in* a certain market is the price at which it is *actually* delivered *there;* not that at which it is put up and prepared for delivery in another more or less distant market. (Cliquot, 3 Wall., 125; Champagne, 1 Ben., 250–1; Sherry, 2 *Id.*, 266–7.)

The market price of cotton in New Orleans, or of corn in Chicago, is that at which those commodities are delivered in those cities respectively.

When we see grain quoted as selling in Chicago at a given price, we know it means the grain, pure and simple, regardless of the sacks or other methods of packing for transportation which the buyer may choose to adopt.

That this is what Congress meant is evident from its use of the phrase "putting up" as a *charge* to be *added* to the appraised value of the goods. The "wholesale *price*" of the goods themselves, *before they are 'put up,'* is appraised; to which the cost of putting them up, etc., was then to be added, under the law prior to March 3, 1883.

Let it be remembered, that, prior to March 3, 1883, *Congress has* NEVER *made 'charges'*—or those items of expense incurred in preparing goods for, and bringing them to, this market—*the subject of appraisement:* NEVER, *from July 4, 1789, to this day.*

"Actual Market-value or wholesale price," at the re-

quired time and place, is the only subject of appraisement.

A value arrived at by appraisal is one dependent upon the judgment of the appraisers, passed upon certain evidence or ascertained facts. Though market-value, thus ascertained, was the primary still it was only *one* element of dutiable value under the statute superseded by the act of March 3, 1883, which has made it the *only* element. The other elements, under preceding statutes, were *not*, however, matters of judgment or opinion, but merely of computation; they were items of mathematical certainty, to be "*added to*" the sum determined by the estimation of the appraisers.

Looking at our compilation, (Post, 89) we find the earliest statutes designated the place of *importation* as that where cost or value was to be ascertained.

The act of January 29, 1795 (1 Stats., 411) substituted "the actual *cost* at the place of *exportation*, including all charges, except," etc.; indicating that 'cost' alone would not have covered 'charges.'

Subsequent enactments, prior to 1823, used like phraseology: actual or net cost being the primary element in all, to which either the charges or a fixed percentage (10% or 20%), in lieu thereof, were to be added, and the duties assessed upon the product.

The act of March 1, 1823, § 5 (3 Stats., 733) first mentions "actual *value*" or "fair market value," as a subject of inquiry; and Sec. 16 of this act (*Id.*, 735) is the first provision for the creation of the office of U. S. Appraiser. Then follow directions as to the method of appraisement. (*Id.*, 736.) This statute, which first uses the word "*value*," is the first to provide for the ascertainment of that value by appraisement: "actual *cost*" and charges, being merely items in a sum in addition, required no such method. These last are so treated in this act of 1823 and in all later legislation. Thus, this fifth section (act of 1823) says that to the

appraised value shall be "added all *charges*," etc. Five years later more definitive provision is made, by the act of May 19, 1828, c. 55, § 8, (4 Stats., 273–4) which requires,

"the actual value thereof at the time purchased and at the place from which the same shall have been imported into the U. S., to be appraised, estimated and ascertained * * And to the value of the said goods, wares and merchandise, *so* ascertained, there shall, in all cases where the same are or shall be charged with an ad valorem duty, be *added all charges*," etc.

Compare, as to methods of appraisal, act of 1832, c. 277, §§ 7 and 8; and sec. 15;—that, to the appraised value, "shall be *added all charges*," etc. (4 Stats., 591–3.) Post 98 top

The compromise act of March 2, 1833, § 3, continued this method for the then-current decade; but—as part of the 'compromise'—agreed that after June 30, 1842, the duty should be assessed at the home valuation; i. e., "at the port where the same shall be entered," etc. (4 Stats., 630.) post 108-9

2 Clay's Speeches, 548.

Neither this part of the compromise, nor that reducing the duties, was it deemed practicable to carry out: and the act approved June 30, 1842, c. 270—the very day when the third section of the act of 1833, c. 277, was to begin its operation—originates the idea of making "the principal markets" of the foreign country the place of valuation; and declares that "to *such* value or price, to be ascertained in the manner provided in this act, shall *be added all cost and charges*" to arrive at "the true value at the place where the same may be entered, upon which duties shall be assessed." (5 Stats., 563, § 16.) Post 98, 99

The first section of the act of March 13, 1851, c. 38, is the same. (9 Stats., 629, 630.) post 100

The twenty-fourth section of the act of June 30, 1864, c. 171 (13 Stats., 217), assumes to make the actual value on shipboard at last place of shipment the standard of value in the assessment of duties; but, inasmuch as it specifically declares that such value is to be arrived at by first ascertaining the cost of the article at the place of *growth*, production or manufacture, and then *adding* thereto all subsequent expenses "to the vessel in which shipment is made to the United States, the value of the sack, box or covering of any kind in which such goods are contained," etc., etc., it did not change the groundwork of appraisal, in the light we are considering it. It will be remembered that the act of March 3, 1865, Sec. 7, cut off these additional items, restoring "the principal markets" as the place of valuation, and the market *value* there as the thing to be appraised. The addition of these charges was again required by the ninth section of the act of July 28, 1866, c. 298, (14 Stats., 330,) and the standard there prescribed was reproduced in R. S., Sec. 2,906 and 2,907 and remained unchanged until this act of March 3, 1883, took effect.

Schmidt vs. Badger, 107 U. S., 88.

The purpose of the foregoing *resumé* is to demonstrate that *only the value of the original article itself, whether grown, produced or manufactured* (the statutes of 1864 and 1866 making no distinction between a manufacture and the product of a foreign soil in this respect) *was ever the subject of appraisal; charges were never to be appraised, under any legislation, from* 1789 *to this day.*

Sampson vs. Peaslee, 20 Howard, 576, top.
Irvine vs. Redfield, 23 *Id.*, 172.
Greeley vs. Thompson, 10 *Id.*, 225.
Grinnell vs. Lawrence, 1 Blatchf., 346.
Reiss vs. Redfield, 4 *Id.*, 382, Sec. 3.

Yet, in the case at bar, under instructions from the

Secretary, *the appraiser included as part of the appraised value the items of 'charges,' which were not subject of appraisement.*

They did this, not because that course was usual; (Rec., 30, mid.; fol. 53) nor because, in *their* judgment, it was part of the market-value, and required by the statute; (Rec., 28, mid., and fol. 50) but solely because they were peremptorily required so to do by the Secretary of the Treasury. (*Ib.*)

The Act of Aug. 30, 1842, c. 270, § 24 (R. S., Sec. 2652) makes it "the duty of all collectors and other officers of the customs to execute and carry into effect all instructions of the Secretary," etc.; declaring that his decision "as to the true construction or meaning of any part of such revenue laws" shall be conclusive and binding upon such officers—though, of course, not upon the merchant or adverse party, who can review it in the manner pointed out by the statute and pursued here. (Treas. Reg., A. D. 1874, Art. 1057. Do., A. D. 1884, Art. 1384.)

If the Secretary's instruction is in conformity with law, it is of no consequence that his subordinate's action only, "and not his will" responds thereto; but, if his instruction is legally erroneous, the courts will redress the wrong inflicted upon the protesting merchant.

Sampson vs. Peaslee, 20 How., 576.

In respect, particularly, to this matter of cartons and like boxes and coverings, the fact is conceded that the Secretary did (by circular of May 15, 1883, No. 5706; Rec., 28, 29, ~~and Appendix B~~) depart from the time-honored, and judicially and legislatively sanctioned, usage of his department by directing these accidental accessories of imported merchandise to be treated as part of *its* "wholesale price or market value" *in* those

markets where such accessories are, in fact, neither needed nor used! (Rec., 26, middle; and *passim.*)

That the usage, from time immemorial, had been to treat the cost of cartons as *charges*, "to be added" to the market value of their contents, instead of being taken as part thereof, is not only stated by the witness from the custom-house (Rec., 30) but is shown by the departmental decisions collated in our Appendix B, and by the judicial recognition of this practice in the decisions cited, and many others that might be cited.

Thus, this court say, of the Statute of 1846:

"One other ruling of the court was given upon the prayer of the plaintiffs, to which the *defendant* [Collector Peaslee] *excepted*. It was this: that so much of the additional duty of 20% as was levied upon the *charges and commissions*, and paid by the plaintiff under protest, was unauthorized by law. This ruling of the court is a correct interpretation of Sec. 8, act of July 30, 1846 (9 Stats., 42, 43). It declares, if the *appraised value* of imports which have actually been purchased shall exceed by 10% or more the *value declared on the entry*, then, in addition to the duties imposed by law on the same, there shall be levied, collected, and paid, a duty of 20% *ad valorem* on such *appraised value*. In other words, the 20% *ad valorem* is to be on the appraised value only, without being assessed upon the charges and commissions."

Sampson vs. Peaslee, 20 How., 575–6.

N. B. The foregoing quotation is *italicised* conformably to the original.

It emphasizes the distinction between *appraised* value and *dutiable* value; the latter being the former, plus *charges*—which are no part of *appraised* value.

The evidence shows, then, that cartons such as are the subject of the present litigation were, by the usage of the Custom House, under the supervision and decisions of the Treasury Department, long prior to March 3, 1883, treated and considered as "charges"; while the statutory phraseology, above quoted, indicates that

such was the intention of Congress, and that its legislation has been with knowledge of the departmental practice.

" And it is fair to presume in case a certain meaning were attached to certain words in a prior tariff act, that Congress intended they should have the same signification when used in a subsequent act in relation to the same subject matter."

Reiche vs. Smythe, 13 Wall., 164–5.
Stairs vs. Peaslee, 18 How., 529–530.

As already noticed, the Act of July 28, 1866, c. 298, sec. 9 (14 Stats., 330) is the first specifically enumerating "*putting up*" among the "charges" to be *added* to the ascertained market value. Hence, earlier regulations and decisions are not strictly pertinent to this legislation. Sampson vs. Peaslee, 20 Howard, 578. Compare Act of June 30, 1864, c. 171, Sec. 24, (13 States., 217, and App., pp. 102-103. This last cited section declares "the actual value on shipboard", etc., "shall be deemed the dutiable value", to be "ascertained by *adding* to the value of such goods at the place of *growth*", etc., "the cost of transportation," etc., "to the vessel," etc., "the value of the sack, box, or covering of any kind," * * * commission, * * * brokerage, * * * export duties, together with all other costs and charges, paid or incurred *for placing said goods on shipboard*, and all other proper charges specified by law." The Act of March 3, 1865, c. 80, Sec. 7 (13 Stats., 493), declared the actual market value to be the dutiable value. July 28, 1866, Congress again adds charges to market value as the basis of duties, with the declaration that the "putting up" and "preparing and packing for transportation" (i. e., for land and inland carriage), shall constitute charges as well as those which have reference to "shipment," or sea carriage. Prior to this act, it had been held otherwise. See Treas. Circular of May 21, 1863, whereby "collectors and others are informed that this depart-

ment concurs in the decision of the Courts that charges for transportation of goods from the interior," etc., "cannot be added to the value of the goods" * * * "All costs and charges incidental to the shipment," etc., "should be added," etc.

This act of 1866 requires that not only this transportation, but the *preparation* for it, should be deemed a "charge" upon the goods, and *added* to their value. Fully cognizant of the course of precedent legislation and of departmental practice, Congress declared by the Act of March 3, 1883, that *none* of these expenses theretofore added to the "wholesale *price*" at which goods were sold in the designated markets should be thereafter added; but only that price or value be adopted as the basis for assessing duties.

In the case of Cliquot's Champagne, 3 Wall., 114, it was said by the Supreme Court of the charge to the jury that it "covered the entire case and is satisfactory to this Court" (p. 142). In that "full and able charge" (*Ib.*) the "actual market value" in the sense of the statute is thus defined:

> "The market value of goods is *the price at which the owner of goods holds* THEM *for sale;* the *price* at which *they* are freely offered in the market to *all the world;* such prices as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold *in the ordinary course* of trade." (3 Wall., 125.)

The language of successive statutes has been thus copiously reproduced and reiterated, in connection with this accepted definition of the term "market value," as used in them, because we apprehend that definition has been overlooked in the opinion and action of the Department upon the present law, through hasty adoption and misapplication of the inadvertent expression found in the *obiter* remarks of Mr. Justice Clifford in the case of Cobb vs. Hamlin, 3 Clifford, 200; remarks which that lamented jurist himself would not have held

applicable in construing this Act of March 3, 1883, Sec. 7; as we shall show presently by an examination of that case.

In Cobb vs. Hamlin, the sole issue was whether or not the cost of boxes, and of packing previously-purchased lemons and oranges in them, should be added to the price of the fruit, as the basis of duty. The Judge rightly held they should *not* be added; and this determined the case on its facts. He, however, goes on to state in his opinion, what he should have ruled the law to be upon a different state of facts; *i. e.*, if the fruit had been bought boxed; and has no doubt, under *that* statute, that the price of the box should be deemed part of the market value, in such case, if actually so purchased, and if it "is usually so purchase *for shipment*," &c. (3 Clifford, 200.)

The fallacy is in assuming, as the statutory basis, the value as "packed for shipment." (*See N. Y. Atty. Gen. Op., 174.*) This is the fundamental error of the Department and the Appraisers in our case, couched in a little different language, to wit: "*in marketable condition*," &c.

Both these phrases contemplate *the ultimate destination* of the goods (the United States markets), and the *preparation* made in view of that destination, as an element of the actual value of the goods *in* the foreign market. This construction has some reference to our market, while the statute has not the slightest; but studiously disregards it. The "Compromise" debates of 1833, as well as earlier and later discussions, show that the purpose was to get a value where (as was said in the Champagne Case, 3 Wall., 125) "all the world" stand upon the same footing, *i. e.*, the wholesale price at which *anybody* can buy and have the goods delivered in the principal markets, for *any* purpose—whether for shipment or immediate consumption. It is not an exceptional price for this market, or that of any other one country, based upon peculiar considerations. It is "the ordinary course of the trade" in that article in

those markets. (3 Wall., 125). The Case of Harding vs. Whitney, 4 Cliff., 96, arose under a clause of the Act of 1857, requiring the ascertainment of the value of the particular commodity mentioned "at the *port* of exportation;" (4 Cliff., 98) thus considering it as an exportable article with a fixed destiny hither; (15 Atty. Gen. Op., 79, mid.; 173, bot.) upon which all the expense of putting up and of getting it to that "port" had been paid; the act of 1867 says, "excluding charges in *such port*." (14 Stat., 560.)

Congress evidently determined that no such construction—whether correct or erroneous as applied to the Act of 1865—should be given to this Act of March 3, 1883, Sec. 7; since (as already observed), it declares that the expense of "*putting up*" the goods,—preparing them for reaching *that* market,—shall *not* be added to make dutiable value; or it repeals R. S., Sec. 2907, which alone allowed such addition, this repealed section being a reproduction of the Act of July 28, 1866, c. 298, Sec. 9, substituted for the legislation of 1865.

Recurring to the *facts* of our case, the testimony shows that such gloves and hosiery were not "in the ordinary course of trade" at Chemnitz, bought and sold packed; (Record, 20, bottom, and 21, top; 26, middle); and that these particular purchases were made of the *loose* goods, subsequently put up in these cartons, prepared and boxed for transportation and shipment. (Record, 21, bottom; fol. 38.) The facts, therefore, are like those in the case of Cobb vs. Hamlin, rather than Harding vs. Whitney.

Ultimately refusing us a new trial upon a ground entirely different from that upon which he originally directed a verdict (see his Opinion in our Appendix C), and making his decision so long after the testimony was presented, Judge WALLACE (having only mss. minutes of the evidence) fell into error as to this *fact*. He

wrongly assumes that our merchandise "*at the time of the purchase* was in cartons;" and that, at Chemnitz, gloves and hosiery intended for our markets, "are usually prepared *for sale* by the manufacturers in cartons, *not* for the purpose of transportation, but because purchasers for our markets prefer them put up in that form:"—And then makes this erroneous assumption of facts the ground of his final decision against us.

Thus, in less than ten lines of his statement of the facts to which he applied his theory of the law—that theory resting upon these supposed facts—there are three fundamental errors:

(1.) That our goods were bought in cartons; (Rec., 21, bottom; fol. 38.)

(2.) That they were usually so bought; (Rec. 21; 26, mid.)

(3.) That they were *not* so put up for the purpose of transportation.

"Gloves and hosiery, such as are contained in the entry in this case are usually *put up* in boxes FOR TRANSPORTATION," etc.; (Rec., 17; close of fol. 28.) "It is *only* for getting the goods over here * * * and it facilitates everybody when the goods are *put up for transportation* in this way" (Rec., 19; fol. 33, cross-ex.)

If there was any dispute about these facts, and they were so essential as Judge WALLACE'S *last* opinion makes them, we were certainly entitled to go to the jury upon them.

To the facts, as the uncontradicted testimony above referred to establishes them, the opinion of the Attorney-General, which Judge WALLACE relies upon and follows, has no application. It relates only to articles actually sold, and customarily sold, in boxes. These were neither so sold in this particular instance, nor generally in the Chemnitz market. Therefore the Attorney-General's opinion, if a correct statement of legal

principles as applied to the facts to which it is applied, is not antagonistic to our present suit. Nevertheless, we do not consider it a sound exposition of the law applicable to the state of facts upon which it is predicated.

The euphemism *in "marketable condition,"* placed by order of the Secretary upon each of our invoices, is *proved*, (Rec., 27, top; fol. 47) to mean *only those very items mentioned* in R. S., Sec. 2907, *as charges* to be *added to* (and not a part of) the market value which is to be determined by appraisement;—which section was *expressly* repealed by this act of March 3, 1883, § 7.

So, according to this theory of the administrative officers, all Congress contemplated—or, at least, all these officers mean shall be accomplished—by the careful and, at the same time, comprehensive phraseology of this section 7 is a mere change of *form*, and not of *substance!* Instead of *adding* charges, they are to be treated as part of the market value! This value is increased by a hypothetical amount, instead of by the charges actually incurred!

Did Congress suppose that "actual market value" would, after March 3, 1883, be construed to mean anything different from what it had meant for nearly a hundred years?

Manifestly not: since Congress, adopting the recommendation of the Tariff Commission in this matter, supposed the customs-revenues would thereby be cut down on coarse goods one-quarter (less upon finer goods); whereas this forced construction put upon the law hardly reduces them at all.

If the adoption of this euphemistic phrase, "in marketable condition," does not evince a purposed evasion of the law, it indicates a consciousness of the insecurity of the ground upon which they stand. Otherwise, why cover up the *facts* by an ambiguous expression? Why not *state* the fact, as we proved it

to be, (Record, 27, top) and say: "Add for cartons and packing?"

The customs officials felt their changed course to be one that (especially under § 7, Act of 1883) would not *look* right, at the first glance; so they try to give it as plausible and presentable an appearance as they can by dressing it up in a garb that shall disguise its true character.

Then the advice of the Attorney-General is asked, upon a statement of facts *not* corresponding with those proven in our case; and on Jan. 11, 1884, he signs an "opinion" upon the subject, either drawn by himself or by some subordinate for him, which (for the convenience of the Court, and because Judge Wallace ultimately followed it, giving it a weight which he denied it at the trial) we have printed in our Appendix C, Pp. 125–9.

Premising that it appears to be the established policy of the Department of Justice to sustain the claim of the U. S. and its administrative officers, unless prima facie palpably untenable, "because the adoption of any erroneous legal construction in favor of the claimant would inflict a lasting and irremediable injury upon the U. S., whereas an error against the claimant only involves the loss of the temporary use of the money, and can speedily be corrected by application to the court" (XV Atty.-Gen. Op., 461–2; xvi *Id.*, 92, 271, 344–5), we will note that only the first question submitted, and its answer, touch our case; and that but incidentally; since (as already noticed) our goods were not, generally nor in this particular instance, sold *in* cartons nor *by the carton*.

The above-indicated question propounded to him is:

"*First.* Whether Sec. 7 of the tariff-act of Mar. 3, 1883, does more than repeal duties upon the charges imposed by the sections of law named in said Sec. 7, and which are thereby repealed, and other provisions of law (if any) of the same character."

The Attorney-General prefaces his reply by "a brief

review of the previous legislation;" remarking that "By the acts of 1789 and 1790 the actual cost of merchandise * * was made the basis for estimating *ad valorem* duties, and *all charges were expressly excluded* therefrom."

This quotation only partially reproduces the strong language of those enactments. They, like the acts of 1799, 1816 and 1817, make "*the nett prime cost*" the basis, "exclusive of *all* charges." (See our Compilation of Stats., Appendix A., 91, 107.

Webster defines '*net*,' or '*nett*,' as "clear of all charges and deductions; as net profit; net income; net weight, etc.;" and "*prime*," he defines thus:—"First in order of time; original."

This may be fairly considered as indicating the meaning of "actual cost," etc., in later enactments. The Attorney-General treats them as synonymous terms.

Tracing the basis of *dutiable* value down to more recent legislation, he cites the act of June 30, 1864, c. 171, § 24, which makes "the value of the place of *growth*," etc., the first factor of the sum, to be determined by appraisal, and *adding* thereto "the cost of transportation," &c., &c., "with *all the expenses*" from the place of *growth*, &c., &c., to the vessel, &c., "the value of the sack, box or covering of any kind in which such goods are contained," commission, &c., &c., together with all costs and charges, paid or incurred in placing said goods on shipboard, etc., etc. (13 stats., 217.)

The starting point is the value at the place of *growth*, etc.

Note, that it first mentions things *grown*. It places the fruits of nature and the products of the soil, mine, or cliff—crude materials—upon precisely the same footing as manufactured articles, with respect to time, place, and *method* of valuation; to wit, the actual

value as grown and wholesaled in the principal markets, etc.

The prime factor is the value of the hair (cleaned or uncleaned), sumac, paving-stones, trees, stockings, lemons, potatoes, gloves, wool, woolens, cotton, etc., etc., just as they are brought to and offered by wholesale in their home markets; all things else are *added* unto them.

This was what that law intended; and is what was practically done under it.

The act of March 3, 1865, § 7, repealed these sections of the act of June 30, 1864, and any other legislation imposing duty upon commissions, or any of the expenses of putting goods on ship-board. (See our Appendix A.)

The Attorney-General says "the act of 1866 *modifies* the basis prescribed by the act of 1865 by adding thereto the cost of transportation, &c,—substantially the items of addition required by the act of June 30, 1864, though the phraseology differs somewhat, as will be seen by comparing them in our Appendix A.

In fact, the act of 1866, § 9, superseded and repealed the act of 1865, § 7 as to subsequent importations; for it states "the rule of determination of the *dutiable value* of merchandise hereafter imported" to be to add to its *market value* the items of the act of June 30, 1864, § 24, expressed in even more comprehensive terms, and some additional specifications, *ex. gr.*, where the act of 1864 required the addition of charges *paid* or *incurred* in putting the goods on shipboard, the act of 1866 says "actual *or usual* charges" (whether really paid or incurred, in any given instance, or not) "for *putting up*, preparing, and packing for transportation [i. e., land carriage] or shipment." [i. e., sea-carriage.]

But, inasmuch as the act of 1866, § 9, did not, in express terms, repeal that of March 3, 1865, § 7, the revisers put *both* into the Revised Statutes; part of

the act of 1865 as Sec. 2906; and that of 1866 as Secs. 2907 and 2908. Schmidt vs. Badger, 107 U. S., 88.

Because the Atty. Gen. and Judge WALLACE (in his tardy adoption of that view) assume that Congress *only* intended to restore the act of 1865, we invite attention to the fact that it was through inadvertence that it appears as section 2906, R. S., after it had been superseded by the act of July 28, 1866, § 9.

U. S. vs. Claflin, 97 U. S., 551–2.

This, however, is not very material, and we do not propose to appear to desire to make it so by dwelling upon it.

Having thus reviewed prior legislation, the Atty. Gen. infers that:

"Sec. 7 of the last mentioned act repeals said Sec. 2907, leaving *in full force* Sec. 2906. This is virtually *a return to the basis prescribed by the act of 1865*, etc.;" namely, the actual market-value or wholesale price * * * *without any addition for costs or charges of any kind whatsoever*. The above repeal, together with the repeal of R. S., Sec. 2908, and of § 14, act of June 22, 1874. * * * *sweeps away all the provisions in force* at the date of the act of 1883, *which required or contemplated additions* of that character to the market-value or wholesale price of merchandise in determining its dutiable value.

The clause in § 7 declaring that 'hereafter none of the charges imposed by said sections, *or any other provisions of existing law* shall be estimated in ascertaining the value of the goods *to be imported*, NOR *shall the value of the usual and necessary*, sacks, crates, *boxes or covering of any kind*, be estimated as part of their value *in determining the amount of duties* for which they are liable' *adds nothing to*, and takes nothing from, *the force and effect of the repeal* of the statutory provisions mentioned. It only emphasizes *the intent of Congress* in making the repeal, namely, that *all charges theretofore required* to be *estimated* should thereafter be excluded. It *results from the foregoing* that, as regards the basis on which *ad val.*

duties are to be estimated, the *only* change effected by § 7, act of 1883, is *to exclude from such basis all costs and charges* which, *under the law as it previously stood, were required to be added*," etc., etc.

Two observations are to be made upon this extract, which embraces the entire answer to the first question put to the Atty.-General.

(1.) It unnecessarily and improperly narrows the effect of the legislative language, Sec. 7, Act of Mar. 3, 1883.

(2.) Even if correct, the error of the collector and the court below is equally apparent; since they *included*, as part of the dutiable value of our goods, "costs and charges which, under the law as it previously stood, were required to be added;" whereas even the Atty.-Genl.'s opinion declares that *such* "costs and charges" should be *excluded*.

First. The Attorney-General's opinion, as above expressed, violates every canon of statutory construction; especially those applicable to a statute imposing taxes and burdens upon the citizen.

Not stopping to here cite authorities to the familiar principle that no *word* (much less a whole clause) is to be treated as vain and useless (Eyster v. Cent. Bd., 94 U. S., 503 top), we will notice that, after specially repealing *every section* to which the Att'y Gen. refers, by *affirmative* words, the act of 1883, § 7, proceeds to lay its imperative injunction *negatively* upon the customs officers, telling them what they must *not* do:—"none of the charges imposed" by *any* provision of existing law shall be estimated; nor shall the value of the usual and necessary boxes, or covering, of any kind.

In answer to the question, What language will make a statute imperative, Lord Tenterden replies: "*Negative words* will make a statute imperative."

Rex v. Leicester, 7 B. & C., 12–13.
Dwarris on Stats., 228.

Lord Kenyon says:

"Negative words will make a statute imperative; and it is apprehended that affirmative may, if they are absolute, explicit, and peremptory, and show that no discretion is intended to be given, and especially so when jurisdiction is conferred."

This act of 1883, § 7, certainly "*does* more than repeal duties upon the charges imposed" by the repealed sections and any other provisions of law—whether "of the same character" or not.

That is, it does "more" in *terms;* and more in *fact*, if this does not practically suffice.

It first covers all those items specified in the sections expressly repealed.

If, anywhere upon the face, or hidden among the verbiage, of any of our voluminous laws, there is one, or *a provision in one*, which any ingenuity of interpretation *could* so construe as to impose or authorize collection of duty upon a '*charge*' on goods, it annuls that.

Then it goes further. As if, with wise prevision, intending and determining to frustrate any attempt upon the part of over zealous customs-officers to evade this preceding clause, by any pretext, plausible or other, it adds this further command, addressed to them:—

"NOR *shall the value of the usual and necessary sacks, crates, boxes, or covering,* OF ANY KIND, *be estimated* AS PART OF THEIR VALUE *in determining the amount of duties for which they are liable.*"

The substance and legal effect of all this is;—

(1.) *Charges* enumerated in the repealed sections shall no longer be dutiable.

(2.) Neither shall any *not* so enumerated.

(3.) Nor shall the box, or covering, "of any kind," under any form or subterfuge whatever.

It was *after* prohibiting the addition of any "charges" known to the customs law, that Congress,

ex abundanti cautela, goes on to say that boxes and other coverings shall not—what? be taken as a dutiable charge? No!—*shall not be estimated as part of the goods to be imported* in determining the duties to be assessed thereon.

The first part of the clause says (virtually) boxes and coverings shall not, *as charges*, be *added* to the value of the goods—as they had been for the seventeen preceding years—and the conclusion of the clause declares that (not being *additive to* the market value) neither shall they be estimated *as part of it*.

Yet the Government's whole case rests upon the theory that the last part of this clause means nothing and can be utterly rejected! AND FOR WHAT PURPOSE? IN ORDER TO DO THE VERY THING IT FORBIDS!

The *old* canon of construction is that "a statute is to be so construed that no clause, sentence or word shall be superfluous, void or *insignificant*." The *new* idea seems to be that a whole clause may be rejected, if it stands in the way of what the administrative officers wish to do.

Eyster vs. Cent. Bd., 94 U. S., 503, top.
Reynolds vs. Baldwin, 1 La. An., 162,
Wilson vs. Biscoe, 6 Eng. (Ark.), 44.
McKay vs. Detroit, 2 Mich., 138.
Alexander vs. Worthington, 5 Md., 471.

Not only must each word and clause be given due significance, but it must be that which they ordinarily and naturally import.

Op. of Justices, 7 Mass., 523.
Quigley vs. Gorham, 5 Cal., 418.
Holmes vs. Carley, 31 N. Y., 289.
Allen vs. Ins. Co., 2 Md., 111.
Barkinson vs. State, 14 Md., 184.
State vs. C. & L. Tp. Co., 2 Sneed, 88.
Mayor vs. Winter, 29 Ala., 651.

And, if there *can* be any ambiguity perceived in this statute, which clear as it seems to us, is nevertheless,

read by us and the Atty.-General so differently, the doubt (if any *can* arise) should be solved in favor of the merchant; for taxes are never laid, nor burdens and restraints of liberty or trade, ever imposed upon a doubtful construction.

U. S. vs. Isham, 17 Wall., 504, § 4.
Girr vs. Scudds, 11 Exch., 191–2.
Conroy vs. Warren, 3 Johns. Cas., 259.
Wright vs. Briggs, 2 Hill., 79.
Powers vs. Barney, 5 Blatch., 203.
Liverpool Hero, 2 Gall., 184.
Adams vs. Bancroft, 3 Sumn., 384.
Richardson vs. Emsierller, 14 La. An., 658.
Chase vs. N. Y. Cent. RR., 26 N. Y, 523.
Dwarris, 255.
Elam vs. Rawson, 21 Geo., 139.
U. S. vs. Morse, 3 Story, 87.
Denn vs. Diamond, 4 B. & C., 248.
Waterhouse vs. Kean, *Ib.*, 200.
Tompkins vs. Ashby, 6 *Id.*, 541
Warrington vs. Furbert, 8 East., 242.
Gilduit vs. Gladstone, 11 *Id.*, 675.
Dock Co. vs. Brown, 2 B. & Ad., 58.
Parker vs. Gt. Wn. Ry., L. J., 1844, C. P., 105.
Barrett vs. S. & D. Ry. Co, 2 M. & G., 134..
And upon error, 3 *Id.*, 956.
Scales vs. Pickering, 4 Bing., 448.
Scruton vs. Snaith, 8 *Id.*, 152.
State vs. P. P. Car Co., 23 N. W. Rep., 873.
State vs. McFetridge, 24 *Id.*, 140.
Sewall vs. Jones, 9 Pick., 414.
U. S. vs. Watts, 1 Bond, 583.
U. S. vs. Wrigglesworth, 2 Story, 373.

And the construction must be in accordance with the usages and vocabulary of merchants. It abolishes all those expenses incident to importations known to the trade as "charges." 17 Wall., 504, § 2.

U. S. vs. 200 chests of Tea, 9 Wh., 438.
U. S. vs. 112 Hhds. Sugar.
U. S. vs. Sarchett, Gilp., 272.

And the multitude of more recent decisions.
Rheimer vs. Maxwell, 3 Blatch., 124–5.

A comparison of the acts of June 30, 1864, and March 3, 1865, with R. S., Secs. 2907 and 2908 (the act of July 18, 1866, § 9) will suffice to overthrow the theory that the act of March 3, 1883, § 7, was merely a return to, and practical revival of, the act of 1865, § 7.

The act of June 30, 1864, § 24, ascertained the dutiable value "by adding to the value of such goods at the place of growth, &c., the cost of transportation, shipment and transhipment, with all the expenses included, from the place of growth, &c., whether by land or water, to the vessel in which shipment is made to the U. S., the value of the sack, box, or covering of any kind, in which such goods are contained, commission at the usual rate, &c., brokerage, and all export duties, together with all costs and charges paid or incurred *for placing said goods on shipboard*, and all other proper charges *specified* by law." (13 Stats., 217.)

(Memo. At that time, "putting up, preparing and packing" were *not* "charges *specified* by law.")

The act of Mar. 3, 1865, § 7, did not profess (as that of Mar. 3, 1883, § 7, does) expressly to do away with *all* "charges." It repealed Secs. 23 and 24, Act of 1864, and all other provisions of law imposing duties on the *enumerated* charges "and other *like* costs and charges, *incurred in placing any goods, &c., on shipboard*." (13 Stats., 494.) p. 104

This did *not* in terms cover the "charges for putting up, preparing and packing *for* transportation," &c.

These last-named charges, which *precede* transportation, were first *specifically* mentioned by the act of July 28, 1866, § 9, which requires them to "be *added* to the wholesale price, or actual market value," etc. (14 Stats., 330.) This section of the statute became R. S., Secs. 2907–8; while Sec. 2906 embraces only *part* of Act of March 3, 1865, § 7.

Thus it will be perceived that the act under which Cobb v. Hamlin, 3 Cliff., 191, was decided did not *expressly* declare that the cost of "putting up, preparing and packing" should not be added to the market value, or taken as part thereof; yet Judge Clifford held that the cost of wrapping the lemons, *one by one*, in tissue paper and packing them in boxes was no more a dutiable charge, or part of their value, than were the boxes themselves.

He so held because, the lemons having been bought in bulk for shipment hither, he considered all subsequent expense of carrying out that purpose as *ejusdem generis* with those enumerated; *i. e.*, as being "*like* costs and charges, *incurred in placing the goods on shipboard*"—the phrase with which § 7, Act of 1865, concludes its enumeration on non-dutiable charges.

In that state and view of the law, it might, perhaps, become material to consider whether the goods were bought in bulk, and whether the expenses were those subsequently incurred to prepare them for shipboard; even though it might sometimes result in the anomaly of a purchase in bulk paying duty only on the value of the bare lemons, while a like quantity, bought at the same time and place, but papered and packed in boxes, would pay double the amount of duty collected upon the other; the usage (if that be resorted to, and allowed to control) to be considered not being that of the port of purchase or shipment but of the *principal* markets of that country.

Inasmuch as a misconception of the law applied to the facts in this Cobb case, and of the effect of the opinion therein, appears to be the foundation of the Attorney-General's Opinion and of the judgment against us below, we propose to examine it a little farther, in order to demonstrate that neither its principle nor its language justify the conclusions drawn from that opinion, *as applicable to the law of 1883*.

By looking at the positions assumed by the contending parties we find out to what points Judge Clifford's attention was directed by their discussion.

Gov. Gaston, for plaintiff, argued that "actual market value," &c., had received a judicial construction excluding costs, charges and boxes; that, under all prior legislation, these items were brought into the *dutiable* value by addition; but that, by the act of 1865, Congress intended to create a new rule, excluding *all* costs and charges. (3 Cliff., 192.)

Mr. W. A. Field, for the U. S., after an extended review of the statutes, claimed that Congress did *not* intend to exclude *all* charges, but only those incident or subsequent to transportation. He said;—

"Excepting commission, brokerage and insurance, there were *two classes* of costs and charges; the first being *the costs and charges of putting the merchandise into the form in which it enters into trade and commerce*, as putting lemons into boxes; and the second being the cost of transporting this merchandise to the place of shipment and putting it on board. In the law of 1865, it seems to have been regarded that the importation began *when the merchandise began to be transported.*" (*Id.*, 195-6.)

Hence, he argued, the first class of charges were left dutiable, while the second were no longer to be taken into account.

He asserted a difference between ad valorem duties and specific; admitting, as to the latter, that while Congress could (of course) establish an arbitrary tare for the barrels, boxes, and bales, *in the absence of any such law*, the specific duty was leviable *only upon the net weight* of the merchandise. (Citing Wilson vs. Maxwell, 2 Blatch., 316.) Then he concludes:

"This case is also distinguishable from a case where the merchandise is for convenience packed in a box, *which merchandise is not customarily bought and sold by the box*, and *a box of which has no known, commercial*

meaning. Oranges and lemons in boxes are, for commercial and tariff purposes, like molasses in hogsheads, or liquors in casks, barrels, and bottles; the boxes, hogsheads, casks, barrels and bottles are not regarded as independent importations, and are not dutiable as such, but as annexed and incidental to their contents, forming altogether well-known articles in commerce and trade." (*Id.*, 196–7.)

Meeting this argument (and *because* the government had so put their case), Judge Clifford said:

"the views of the department might be sustained if § 23, Act of 1864, had been continued in force, but that section is in terms repealed by the second proviso of the seventh section of the Act (1865) under which these importations were made." (*Id.*, 199, top.)

Still keeping in mind the argument of the counsel against whom he was deciding the cause, at the top of the next page (200) he employs the language quoted in the Attorney-General's opinion:

"Some descriptions of goods are purchased and sold in the foreign market in bulk, and are subsequently to the purchase and sale put into boxes, packages or coverings by the purchaser, for the preservation of the merchandise *and the convenience of shipping.* Other descriptions are put into boxes, packages, or coverings by the producer, manufacturer, or wholesale merchant in the foreign country, and the merchandise is there purchased and sold for exportation in the boxes, packages, or coverings in which it is so placed by the producer, manufacturer, or wholesale merchant. The actual market value in the former case does not include the cost of the box, package, or covering within the meaning of that act of Congress, as the boxes, packages or coverings in such cases are purchased by the shipper, as the means of preserving the goods, and for the *convenience of shipment.* But no doubt is entertained that the words 'actual market value,' WITHOUT MORE, would include the cost of the box, package, or covering in all cases where the merchandise in question was actually purchased in the box, package or covering, and is usually so purchased and sold for shipment

in the foreign market, and where the price includes the box, package, or covering as well as the goods therein contained." (*Id.*, 200.)

After noticing that this purchase was according to the usual custom at Palermo, "If the fruit is purchased in bulk, to have it *packed* in boxes *for shipment*," he concludes his opinion thus:

"Evidently the expense of the boxes and the labor of selecting and packing the fruit were wholly separate from the price paid in the purchase of the same; and it is equally clear that it was incurred to preserve the fruit, and *for the convenience of shipment*. Undoubtedly such fruit is usually bought and sold *here*, by wholesale merchants and jobbers, in the boxes, and without any additional charge for the box; but that circumstance cannot affect the question under consideration, as the inquiry is as to the actual market value or wholesale price of the merchandise in the principal markets of the country from which the same was imported." (*Id.*, 200–1.)

Throughout this opinion, Judge CLIFFORD bears in mind that the law governing his decision *only* excludes from consideration (of the unspecified charges) those expenses which are *incident to getting the goods on board the vessel;* the packing for shipment.

He carefully guards his language accordingly.

Therefore it is, that he naturally lays stress upon the fact that the packing of this fruit was "for shipment;" and that if done before purchase, it could not be said to have been for this purpose; [yet could not this be proved as a fact?]; so that "actual market value, *without more*," might include these charges, under *that particular statute* of 1865.

But the Act of 1883 contains "*more*"—a great deal more! and that *plus* settles the question in our favor when, otherwise, it might perhaps be debatable.

It abolishes and carefully forbids the inequitable

distinction hinted at in this opinion; and does so *because* it is inequitable.

As an abstract proposition, there *ought* to be no difference in duty between two boxes of lemons bought at the same actual cost to the importers, shipped and arriving at the same ports on the same days, based upon the inquiry (otherwise utterly immaterial) whether they were originally purchased in that same foreign market, boxed or unboxed—where they are both laden there and unladen together here, boxed.

Before turning again from this opinion to the unauthorized inferences drawn from it by the Attorney-General, we offer two observations upon the concluding paragraph of Mr. Field's argument (3 Cliff., 197, top), above printed; that boxes, barrels and bottles "are not regarded as independent importations, but as incidental and annexed to their contents."

(1.) Congress *may* make them dutiable independently, whether the contents be free or dutiable, speccially or ad valorem; and has done so, as to bottles. (107 U., S. 85; 108 *Id.*, 106.) and Am. barrels, &c.

(2.) That as stated in the next preceding paragraph of Mr, Field's argument (3 Cliff., 196, bot.), *they were practically separated*, as to goods paying *specific* duty, *by being deducted as "tare."* (Act July 14, 1862, c. 163, § 16; 12 Stats., 558.)

Treas. Cir., Mar. 25, 1872. Syn. Ser., 1077.

Treasury Regulations of 1874, p. 226, ARTS. 521–6, provide for "estimating the allowance for tare, on *all* chests, *boxes*, cases, casks, bags, *or other envelope or covering;*" either by taking the tare named in the invoice, if *both* parties assent thereto; otherwise, according to "the tare prescribed in the following schedule," unless the importer is "dissatisfied with the tare herein prescribed." If the merchant gives written notice of dissatisfaction "in any instance, it will be the Collector's duty to cause the *actual tare* or weight of the cask or package to be ascertained, and for that purpose he may cause to be emptied and

weighed such number of casks and packages as he may think proper."

See also, Treas. Regs., 1884, pp. 241–2, ARTS. 596–8 (under R. S., Sec. 2898), showing the tare on "Nutmegs 33 1-3 per cent. *for the shells.*"

So that, as to goods paying *specific* duties (where value is not involved) either the agreed weight or the actual weight of every kind of covering is taken out, the duty being assessed *upon the merchandise itself;* even if that covering be the natural "shells" of the nutmeg, etc.

What the act of 1862, c. 163, §16, and the Treas. Regs. under it, did for goods specifically dutied, this act of Mar. 3, 1883, § 7, does for goods dutiable ad valorem.

Under this act of 1862 (now R. S., Sec. 2898) there is just the same right (and no more) to say that the cask or box is part of the tallow or the butter therein, as there is under this act of 1883, to say that the cartons are part of the stockings or gloves in them.

This last-named statute is not hasty legislation.

It is, pre-eminently, the result of previous thought, care, and investigation. It is based upon the report of a commission which heard every argument, pro and con.; and this report is the substantial basis of the enactment.

It was the recommendation and design of this commission that cartons, and every species of covering, should *not* enter into dutiable value; coupled with a statement that to adopt this recommendation would, possibly, reduce the customs revenue upon some coarse goods one-quarter; evidently, however, an over-estimate.

In their report this Commission says (at page 41):—

"The recommendation for the repeal of sections 2907 and 2908 are made on the statements of custom-house

experts and importers generally who have *uniformly* insisted that *justice requires their repeal.* The sections in question are those which require the addition to the cost or value of the imported articles of the cost of transportation, shipment and transshipment, and all expenses incurred in the transportation of the articles from the place of growth, production or manufacture to the vessels in which the shipment is made to the United States, the cost or value of the packages and the commissions paid, which in no case shall be less than two and one-half per cent. These sections apply to goods paying an *ad valorem* duty or duty based on value. The law has heretofore regarded these 'dutiable charges' as part of the cost of the goods imported and the effect of the proposed abolition would be to withdraw them entirely from consideration in determining the dutiable value of the goods. *The result of the repeal of these sections would be a reduction,* especially on the coarser and more bulky fabrics, *of a considerable proportion of the present duties, amounting* as we believe, in some instances, *to nearly if not quite one-fourth ;* while on the finer and more highly priced goods, the reduction will be much less. The Commission recommends the repeal of these sections because of *the great labor at the custom-house* in apportioning and distributing the charges on the liquidation of entries (as we are advised the work of liquidation on *ad valorem* goods is more than doubled by reason of these charges and their distribution), the very great *delay* in liquidation consequent on the complicated calculations involved in the distribution of the charges on the goods in the invoice bearing different rates of duty, the *delay, annoyance, and expense to the importer* arising from the necessarily tedious liquidation thus occasioned, and because, in the judgment of the Commission, these charges should not be regarded as part of the cost of the goods."

Manifestly, the Commission contemplated a reduction of revenue, measured by and representing the amount of duties theretofore collected upon the items to be withdrawn from consideration in determining dutiable value; since they say (in effect) the falling off will be in the same proportion that the value of these

"charges" bears to the value of the merchandise charged.

"So far as these provisions are inconsistent with the provisions of previous laws, they show that Congress had changed its policy in this respect and intended to repeal the laws by which it had been established."

Stairs vs. Peaslee, 18 How., 525.

Perhaps the reasons that influenced Congress to existing legislation may not concern us, whether it was the inequality of the tax theretofore laid upon the same article, when considered apart from (but dutiable according to) its contents, i.e., 50 %, if these were silk, and 10 % if they were of hair; or that it was a tax upon a tax or charge, and not a part of the very thing itself which entered into the general consumption of the community; but it is obvious that the reason, whatever it may be, is equally as applicable to these cartons as to the outside box.

Both subserve the same purpose—are different layers of the same cuticle—designed to keep the goods safe during transportation and shipment, and to bring them into this country without injury from extraneous causes, or being rumpled through contact with a large mass of like articles.

The practical difficulty is no greater, in administering the law, whether the goods have but one covering (like cement, &c.) or two or more, like lemons, or gloves, &c.

Or it may be that the reason was to place goods paying ad valorem duties upon the same basis as those upon duties which are specific.

"If the merchandise they contain is subject to ad valorem duty, the value of the sack or barrel should be *added* to the foreign value of the merchandise, to make the dutiable value. If the merchandise contained in them is subject to specific duty, and *the covering is of the kind in which such merchandise is usually imported*,

then the covering will be free of duty. See Cir. Mar. 26, 1872, No. 1077."

Suffice it to say, that the Congressional *will* must stand as the reason for their act.

It is no longer a question for philosophic speculation or of political economy, how much (if any) of the expenses bestowed upon goods *should* be deemed a part of them, or of their market-value.

Congress, and the Tariff Commission, heard all they wished to of such discussion; and then DECIDED that "the coverings of any kind" and the contained goods should, for dutiable purposes, be *legally severed*, as they are physically severable.

They have *always*, heretofore, been severed in *appraisals*, for estimating and ascertaining the sum of the duty; they are *now* severed in *laying* duty.

Revenous à nos moutons. We return to the Atty. Gen.'s opinion, because that is the point d'appui of the whole governmental structure. To that opinion, "with a single qualification," Judge WALLACE gives his assent, as superseding any occasion to reason out the result in his own. Had the Law Officer advised the Treasury differently, *probably* the customs officials would have been instructed to adopt a course consonant to our ideas; although we propose now to show that a correct application of that opinion to our importations would have relieved us of the necessity for the present litigation.

After asserting that the clause of § 7, act of 1883, next preceding its proviso "adds nothing to and takes nothing from the force and effect" of its repeal provisions, he continues ;—

"It only emphasizes the intent of Congress in making the repeal, namely, *that* ALL CHARGES THERETOFORE RE-

QUIRED *to be estimated as part of the dutiable value* of merchandise *should be excluded* in ascertaining such value. It results from the foregoing, that, as regards the basis on which ad valorem duties are to be estimated, the only change effected by § 7, act of 1883, is *to exclude from such basis* ALL *costs and charges which, under the law as it previously stood, were required to be* ADDED TO the current or actual market value."

This statement, accepted and acted upon, *is decisive of the present cause in our favor.*

Reference to the decisions of this Court and the Circuit Court, to the Treasury Regulations and decisions, and to the practice at the Custom-House, shows that CARTONS *and the putting up of the goods in them have always and uniformly*, heretofore, "as the law previously stood," *been decided, held, taken and practically applied as costs and charges "required to be* ADDED TO *the market-value* or wholesale price.

Samson vs. Peaslee, 20 Howard, 576, top.
Irvine vs. Redfield, 23 *Id.*, 172.
Greeley vs. Thompson, 10 *Id.*, 225.
Grinnell vs. Lawrence, 1 Blatchf., 346.
Reiss vs. Redfield, 4 *Id.*, 382, § 3.

The question arose, under the act of 1857, c. 98, § 1, whether American barrels, which had been sent empty from New York to Cuba and brought back filled with molasses were entitled to come in free, as being "in the same condition" as when exported. This Court held they were not, but were dutiable—not as part of the molasses they contained, though a more inseparable covering than our cartons—but *as charges*, to be *added to* the market-value or wholesale price of the molasses itself, pure and simple, to make the dutiable value, upon which the 24 % was to be assessed.

The Court said there should be *added*, with other preceding expenses of packing, &c.

"the value of the *sack, package, box, crates, hogs-*

head, barrel, bale, cask, can, and covering of all kinds, bottles, jars, vessels, and demijohns."

Knight vs. Schell, 24 How., 526–532.
Also, Belcher vs. Linn, *Id.*, 533.

The Court further suggested that

"Confirmation of these views, *if any he needed*, may be found in the *almost unbroken practice of the Treasury Department;*" citing Treas. Circular of Nov. 26, 1846, which "fully justifies the conclusion to which we have come." *Id.* 531.

See our Appendix B, page 110.

Upon page 111 of Appendix B, will be found further "confirmation of these views, *if any be needed*," in the language of Treas. Regs., A. D. 1857, Sec. XV., Art. 306.

"These *charges* [i. e., those to be *added*] are:
FIRST. The expenses of *putting up and packing* together with the value of the sach package, *box*, crate, hogshead, barrel, bale, cask, *can, bottles, jars, vessels and demijohns*, and *covering of all kinds.*"

Appendix B, 113. We will only add a reference to Circular No. 5,922, Sept. 27, 1883. (*Id.*, 113).

"The *practice* of the administrative officers of the goverement, under this clause was to add to the foreign market value of *the merchandise* [what did Sec. Folger mean by *that* phrase?] the cost *not alone of the final or outside sack or box or covering* into which the merchandise was put for safety or convenience of ocean carriage from the country of purchase to the U. S., but the cost of the *covering*, CARTON, *or other device in which the merchandise was offered for sale in the foreign market.*"
Appendix B, p. 118

Thus we find that the Treas. Dept. has never had any trouble in ascertaining the value of the *merchandise itself*, apart from *all* coverings, inner or outer. If any should arise, § 9, Act of 1883, provides for that case.

Certainly, the fact must have been as the Secy states; for "*bottles*," etc., mentioned in the foregoing quotations, were not *outside* coverings. Nevertheless, they were *coverings;* so in fact and ordinary parlance; so in departmental regulations and practice; and so in the recent language of this Court.

Schmidt vs. Badger, 107 U. S., 85.
Merrit vs. Stephani, 108 U. S., 106.

When Congress chose to make this particular kind of covering dutiable as a separate article of importation, though its contents might be free, it did so. (*Ibid.*) Choosing also to make cartons, etc., non-dutiable, though the contents were dutied, its will should be respected by the administrative officers and enforced by the court.

See also, in Appendix B, other Treas. Decs. Nos. 2620, 3550, and 3735; that where invoice did not show that the price included cartons these were added as a charge.

One further illustration of the practice at the Custom house we will notice, because it is stated by a witness (Rec. 30, fol. 53, middle) and arises under § 14 of the Moiety Act, to which attention has not been called, although it is *expressly* repealed by the act of 1883, § 7.

This act of June 22, 1874, § 14, is in Appendix A, at page 90.

It relieves from the forfeiture of goods, in cases where the person entering them has "without intent thereby to defraud the revenue" failed to state upon his invoice or entry the required "charges for inland transportation, commission, etc., *cost of packages, boxes, or other articles containing such goods*, etc., or any other expenses attending the *packing*, shipping or exportation thereof;" and makes it incumbent upon "the collector or appraiser to add the same * * and to impose and add thereto the further sum or amount of

100% of the price or amount so added." (18 Stats., 189.)

The witness testified (Rec. 30, mid.) that *cartons* were always treated as "charges," to be so added, and the 100% penalty collected thereon.

Reference to the speech made by the member of the Com. who reported this bill to the Ho. of Reps. discloses the reason for this sec. 14; that a N. Y. merchant, worth $300,000 had been ruined by a casual neglect to add the insignificant cost of CARTONS to his invoice in making his entry.

Cong. Rec., 43d Cong., 1st Sess., Pt. V, p. 4028; May 19, 1874.

This connection may be the proper one in which to state the Opinion of the Attorney-General *prior* to January 11, 1884.

For forty years, at least, an exception to the rule applied to other merchandise has been made in favor of *wool*, which is dutiable upon its value taken (not in the principal markets, etc.) at the *last port or place of exportation*, "*excluding charges in such port.*"

R. S., Sec. 2908.

In October, 1877, the then Attorney-General, expressed his very carefully considered opinion as to what was the proper method of valuation for duties upon wool brought from Rosario.

"The basis of duty, then, as to these wools, was their market value *at Rosario* upon the day the vessel sailed with them on board from that port; not their value when exported; nor on shipboard; *nor when held for the purpose of exportation. The disposition to be made of them by the purchaser is not an element of their market value;* hence, not of their dutiable value.

The fact that before or after their purchase in that market, or at their fair value *there*, the buyer determines to ship them to a foreign country, and pays the required charge at the port of exportation to enable

him to carry out this purpose, has nothing to do with the correct basis of assessment, which is exclusive of such charges; *i. e., it is the naked market value of the property there,* AS WOOL."

XV. Atty. Gen. Ops., 174.

We must, more briefly (since they affect us less directly) consider the second and third questions put to the Atty.-Gen., and by him answered together. Many, if not all, of the above suggestions are equally applicable to this portion of his opinion.

"SECOND. Whether that section *prohibits the inclusion,* in the *dutiable* value of merchandise, *of the value of the boxes and coverings* which are part of its preparation for sale in the markets of the country of exportation.

THIRD. Is the dutiable value of merchandise its actual market value or wholesale price in such markets *as enhanced by its preparation for sale* in such markets *by the placing in or about such merchandise such boxes and coverings* as are named in question No. 2?"

In other words, does the statute mean what it plainly says, or something entirely different?

The Attorney-General replies:

"As already shown, the *dutiable* value of merchandise, since the modification of the customs-law made by the act of 1883, is the *current* or actual market value or wholesale price thereof, etc. What then is to be understood by *current* or actual market value or wholesale price as used in the statute? [Memo. The word '*current*' is '*not* used in the statute.'] It is the amount of money or price which the article commands in the foreign market, in the condition in which it is there customarily sold and purchased."

He then quotes the language of Cobb vs. Hamlin, as to some goods being sold abroad in bulk and others in boxes; and that in the former case 'actual market value' does not include the coverings (in which the merchandise is *not* sold); in the latter, these words "WITHOUT MORE" do include the box or cover in which the merchandise *is* sold. He then notices that

the Court there held that lemons bought in bulk and afterwards boxed according to custom were not to be dutied as if these boxes, &c., were not part of them when purchased. In Harding vs. Whitney, 4 Cliff., 96, the baling was held (*under act of 1842*) part of the wool. [He does *not* notice (though Judge Clifford does, bottom of p. 98) that wool is *not* appraised at its value "in the principal markets," nor that Judge Clifford treats the baling as coming into the appraisal as *added* "costs and charges."]

He then answers these questions thus :—

"According to the principle of these cases, which appears to me both sound and practicable, the cost of boxes or coverings with which goods are ordinarily prepared for sale in the foreign market, and in which they are usually sold and purchased there (the price paid for the goods including the box or covering, which goes therewith to the purchaser) must be regarded as entering into, or as being an element of the actual market value of the goods.

Section 7, Act of 1883, does not forbid the inclusion in the dutiable value of merchandise of that which forms a constituent of its actual market value."

Appendix C. p. 128.

Neither this opinion nor the statute attempts any distinction between interior and external coverings. The statute *exempts all* alike. The opinion *duties all* alike, if *customarily* the goods are sold so put up, covered and packed. Singularly enough, Judge Wallace dissents from so much of this and Judge Clifford's opinions as takes into consideration the *usage* of foreign markets in determining "actual market value" there. (See Appendix C. p. 123, and 24 Fed. Rep., 853.) This construction makes the "*actual market value*" of goods in the principal markets depend upon the whim or desire of each individual purchaser. It ignores the proviso, as to an attempt *to evade duties* by the adoption of unusual coverings, so far as relates to goods bought covered. Judge W. observes that the opinion in 3 Cliff., 200, is *obiter* as to *this* point; but does *not* mention that it is *obiter* as to *every* point, except the

single one "involved in that case"—whether (under the act of 1865) lemons actually bought in bulk, according to Palermo custom, should be treated as if bought boxed, when the statute said boxes should not pay duty.

Notice that this act of 1883, § 7, so far from denying the right to include the boxes and coverings in *dutiable* value, and transferring it to and permitting it to enter into *market* value (which is an element of the dutiable value) covers the whole ground, and forbids the value of the usual boxes and coverings to "be *estimated* as part of their (the goods,) value.

Remember that these charges, theretofore, had been *added*, as they actually existed, not upon an estimate of value. *Market*-value was and is the thing "*estimated*." The statute specifically tells the customs officers that, thereafter, *neither* shall the charges named in secs. 2907–8) among which these cartons, &c., are included) "be *estimated* in ascertaining the value of the goods" *nor* shall *the value* of the usual coverings of any kind" be ESTIMATED *as part of their* (the goods,) *value* in determining the amount of duties which they are liable."

The bare repeal of secs. 2907–8 destroyed all authority for *adding* these items, as charges. Taxes do not spring up spontaneously. They are created only by positive law; and when that support is taken away they instantly die:—at least, they *ought* to, if administrative officers did not keep them moving by some galvanic process. The repeal of these sections not permitting them to be *added*, as charges actually incurred, the next clause says they shall not have their value *estimated* as part of the *market* value of the goods, "in ascertaining the value of the goods," nor as part of their *dutiable* value, "in determining the amount of duties for which they are liable."

Look again at the Attorney-General's proposition.

"*Section 7, Act of 1883, does not forbid the inclusion*

in the dutiable value of merchandise of that which forms a constituent of its actual market value."

Does it not? Does it not, in effect and most carefully and explicitly, say the duties shall be levied upon the actual market value of the goods, without including therein the value of the boxes or coverings of any kind?

These opinions take no notice of the fact that, in the unbroken practice of the department, up to March 3, 1883, "actual market value" *never meant anything but the bare goods themselves.*

The bare merchandise itself was *always* the thing—and the *only* thing—*estimated.* All else was deemed incidental to that, and *added.* Now, Congress says, "in determining the amount of duties," *stop right there!* Add nothing more! *Estimate* nothing else! Levy the duty upon *the* value which has been heretofore been the first step in the ascertainment of dutiable value. Let this now be the Alpha and Omega of the appraiser's duty "in determining the amount of duties" for which the goods are liable.

Acting upon the recommendation of the Tariff Commission, what Congress desired and intended to do was to relieve ad valorem goods of the burden of paying duties upon the wrappings and vehicles in which they were contained, just as goods specifically dutied are treated. If the language employed failed to accomplish this, we would like to know, in the name of Lindley Murray and Webster's Dictionary, what form of words *would* do it!

We here insert a recent Opinion per Deady, J., in which he concludes that "the case is too plain for argument. The mere statement of it is sufficient. There is *no room for construction*, or difference of opinion."

So we should say, and act accordingly, had not Judge Wallace announced a "difference of opinion" upon

this subject based upon an adoption of the Department's theory of "marketable condition."

DEADY, J.:

"The "costs" and "charges" of which these statutes speak, unless otherwise expressly stated, are the items of expense incurred by the importer *in and about the purchase* of goods, *and afterwards*, and before their arrival at the port of entry. They do not, unless specially mentioned, include the cost of the sack, box, or covering in which the goods are usually contained and purchased. And it may be admitted that when the statute declares "without more"—without qualification—that the dutiable value of imported merchandise is "the actual market value or wholesale price" in the principal markets of the country whence the same is imported, that such value includes the cost of the sack, box, or covering in which it is usually contained and purchased. *Cobb vs. Hamlin*, 3 Cliff., 200. The cost or expense of the covering usual and necessary for the protection and transportation of an imported article from the place of purchase, is, as a matter of fact, an element of its value at such place. And the only question in this case is whether or not Congress has said, without qualification, that the dutiable value of this cement is "the actual value or wholesale price" in London. And, *first*, although the "actual value" of an article in the country where purchased, does, in the abstract, include the cost of the *outside* package in which it is contained and placed for shipment, yet it is plainly inferable from the terms of the legislation on the subject, as above stated, that whenever Congress has intended to include that expense in such value as a basis for estimating duties, it has expressly said so. To go no further back than 1864, that act expressly provided that the "duitable value" of goods should be their value on shipboard, to be ascertained by *adding* to their value at the place of growth, production or manufacture, among other things, "the value of the sack, box or covering of any kind" in which they are contained. The act of 1865 simply

made the "dutiable value" of goods their "actual market value" at the period of exportation, and expressly repealed section 24 of the act of 1864, requiring the value of the "covering" to be considered in ascertaining such "market value" while the act of 1866 simply restored the rule of valuation prescribed by the act of 1864.

From this statement of congressional action or legislative habit on this subject, it may fairly be inferred that the expense of the "covering" of imported merchandise is never to be included in ascertaining the "dutiable value" thereof, unless the statute expressly so provides. And therefore, if the act of 1883 did nothing more than repeal section 2907 of the Revised Statutes, (section 9 of the act of 1866,) authorizing the value of such "covering" to be *added* to the "wholesale price," in determining the "dutiable value" of this merchandise there would be no legislative authority for adding the value of the barrels to the value of the cement, as a basis of estimating the duty on the latter. But when it is considered that the act of 1883 not only repeals section 2907 of the Revised Statutes, authorizing the value of the barrel to be added to that of the cement, but also expressly prohibits the value of the former to "be estimated as a part of the value" of the latter "in determining the amount of duties for which it is liable," the case is too plain for argument. The mere statement of it is sufficient. There is no room for construction or difference of opinion."

Meyers vs. Shurtleff, 24 Fed., Rep. 577–579.

In a recent "charges" case in New York, tried last month before Wheeler, J., he directed a verdict for the *plaintiff*, saying to the government officials;—"Why, it seems to me, you are doing just what you did before this law was passed!"

The *fourth* question put to the Attorney-General, he answers negatively. (See Appendix C.)

As it does not concern us, our goods not being of the class referred to therein, and the answer favoring the importer, we will not discuss it.

It is this :—

"FOURTH. Whether there is any distinction to be made, in the assessment of duties, as to the boxes and coverings which are part of such preparation, between the boxes and coverings which do and those which do not go to the consumer?"

Judge Deady holds in the foregoing opinion, that there is no such distinction; the barrels in which cement is sold not being dutiable.

So long ago as, when Knight vs. Schell and Belcher vs. Linn were decided, it was declared to be "the unbroken practice" to treat the *barrel, cask, can, demi-john,* and *bottle,* which do "go to the consumer" as *charges;* to be *added to,* and not estimated as part of, the goods they contained.

The before-quoted Treas. Cir., No. 1077, March 26, 1872, answers the inquiry the same way; the value of barrels and bags is to be *added to* that of their contents, if dutiable ad val.; if the contents are subject to specific duties, the barrels and bags are free.

Why is a barrel containing cement any more part of its contents than one containing tallow?

There are not two dutiable articles under our tariff, covering really the same goods, ultimately consumed here, viz.; (1.) Hosiery and gloves; and (2.) Hosiery and gloves in cartons, or cartons of gloves, &c. Either our goods are dutiable (as they were dutied) as hosiery and gloves, or they are non-enumerated.

Yet, the whole foundation of Judge Wallace's Opinion is that there are *two* recognized forms of lemons, dutiable here at different values, as they were either bought boxed, or boxed by the purchaser abroad; that our tariff, *now,* takes cognizance of lemons loose as a distinct subject of importation from lemons boxed; nay, more, that it duties them at different amounts according as they were boxed at one time or another in Palermo.

If duties, twice as much, in one case as the other, are imposed by our present tariff upon any such ridiculous distinction as that, Congress *ought* to eliminate it from our statute books, *if it can*. But if the language it has employed does not accomplish it, we cannot conjecture what would.

In like manner, the government's theory makes hosiery and similar articles from Germany pay more duty than do the same goods coming from France and England, simply because, customarily, in the former, the price stated to American buyers (who desire their goods so put up and packed for transportation and shipment) includes with that of the goods the cost of the cartons and other items mentioned, while in the latter countries it does not include such items. (Record, 18, middle.)

The *fifth* and *sixth* questions put to the Attorney-General (Appendix C.,) do not concern us, not arising in our case; so they will not be further noticed.

It will be seen that he treats them as answered by what he had already said.

He also considers the remarks which we have already quoted as sufficient answer to the seventh and final questions, viz.:

"SEVENTH. Whether any cost or value of labor in putting merchandise into boxes or coverings, in preparation for such markets, can be, in any view, a part of the value *of such box or covering* [not of the *goods*] within the intent of said sec. 7?

And, finally, what (IF ANY) boxes or other coverings or item of labor or preparation herein described, should be estimated or omitted in fixing the dutiable value of imported merchandise under said act of 1883?"

Though the labor of putting goods into cartons is not part of the value of the *cartons*, it is part of the "putting-up" charges, and not dutiable.

In our case, they exacted duty upon the cost of putting the cartons into the outside cases. (Rec., 23, middle, fol. 41 ; and p. 27, beginning of fol. 48.)

Nobody has yet indicated to us whence authority is derived for doing *this*.

There is a reference in the Attorney-General's Opinion to a Treas. Circular of Sept. 27, 1883, that "the *dutiable* value is the actual market value in the condition of finish and preparation for sale in which they are finally offered by foreign merchants to negotiating customers;"—which language is deemed by him to be correct.

If "finish and preparation for sale" includes boxes and coverings (as it seems to do) it is *not* correct, because in direct contraventionof the terms of the Statute.

Again ; "*finish*," in tariffs and custom-house parlance has *always* meant something done to the merchandise itself, inhering in it, and permanently affecting its value to the consumer ; such as "calendering" or bleaching, or removing the long hairs from seal-skins or furs. A man is prevented, by the oath now required, from buying cloth unbleached, then bleaching it abroad, and entering it here at the price he paid for it unbleached. Stockings may be bot undyed, &c. Rec. 24, fol. 43.

The report of Appraisers Ketchum and Rice and Dep.-Col. Fiske, made to the Secretary, Aug. 6, 1883, fully explains this. See Appendix C., p. 142, 143. 123, top

A few explanatory words are needed as to Judge Wallace's opinion. Appendix C., 24 Fed. Rep., 852.

He remarks :

"A verdict was ordered for the defendant at the trial, on the ground that *the plaintiffs' protest was insufficient to present the objections relied upon by them* to the exaction of the duties in controversy."

This phraseology is capable (and unexplained would

receive) an erroneous construction, prejudicial, perhaps, to Judge Wallace.

No one, reading our protest (Rec. 14), would for a moment doubt that it is amply sufficient to raise the questions here discussed, viz.: the right to treat coverings, in any case, as part of the contained goods. At the trial Judge Wallace *agreed with us* that no such right existed.

But the ground taken by him, in directing a verdict, was that the cartons, though not dutiable as part of the market-value of the gloves and hosiery, were not free of duty, but should have been classified and assessed at 35%, as *manufactures of paper*."

And he queried whether our protest was not defective, in not stating how the cartons should have been dutied.

It was *not* questioned that our protest was sufficient to raise the issue of the legality of the assessment *upon the gloves and hosiery*, but was doubted whether it ought not, in addition to pointing out (with great particularity) the errors in the assessment actually made, to have gone on and instructed the Collector that it was his duty to treat the cartons as an importation of themselves, dutiable at 35% as manufactures of paper!

This ground, taken by the judge, was as unexpected (and even more unpalatable) to the district attorney as to us. No U. S. Atty., nor Treasury or Customs official, nor any importer, ever imagined such an idea could be entertained for a moment. Yet the order directing a verdict against us was based *solely* upon that. Accordingly, *this* point was the one mainly discussed by us upon the motion for a new trial, the present issue being only incidentally treated. It was a great surprise to us that, when Judge WALLACE subsequently abandoned his own theory, he adopted that of the government, which he had promptly and explicitly rejected at the trial.

This will be seen by the remarks with which he accompanied his direction, reproduced from the stenographer's minutes, in Appendix C. p. 120,

Immediately after announcing that he had "concluded to direct a verdict for the defendant," he adds:

"Sec. 7 of the Act of March 3, 1883, not only repeals Secs. 2907 and 2908 of the Revised Statutes, but also declares affirmatively that the value of the usual and necessary sacks, crates, boxes or coverings of any kind shall not be estimated as part of the value of the goods imported. Were it not for this affirmative declaration, the only rule of estimating the dutiable value of the goods would be that prescribed by Secs. 2905 and 2906 of the Revised Statutes, and Sec. 9 of the Act of March 3, 1883. As it is, however, the current market value or wholesale price of the goods themselves *excluding the value of the usual and necessary boxes, coverings*, &c., is the rule which obtains."

Appendix C., 120

After noticing that there are many articles, like blacking, cigars, cement, &c., &c., which go to the consumer in and with their coverings, being bought at one price, so that "the actual market value" is the value of the goods as covered, he proceeds:

"Where the boxes or coverings are not usually treated as a part of the goods themselves, and are not regarded as practically essential to commercial dealing in the particular goods, the boxes, coverings, &c., should be *classified and assessed according to* THEIR *dutiable character*. THEIR VALUE CANNOT BE ADDED TO THE PRICE OR MARKET VALUE OF THE GOODS; *but duty is to be collected upon them according to their proper classification.*"

Id.

He then concludes:

"Now, applying these legal conclusions to the evidence in this case, it seems to me there is no fair question for the jury; *because the hosiery* which was imported here *is not an article which*, according to the usage of the trade, or from its inherent characteristics,

is inseparable from the cartons in which it was imported." * * *

"The article of hosiery can be bought and sold without them; but they are kept better; they are more easily counted; it is a more convenient form in which to deal with them when they are enclosed in the cartons.

"I do not think there is any real dispute or disputable inferences upon the evidence as to these facts.

"*Duty was therefore collectible on them as* PAPER BOXES; and, as the protest is not placed on the ground of an *improper classification*, I think the defendant is entitled to a verdict." (*Id.*)

The Court below first erred in taking the position that the cartons were dutiable as "paper boxes," and in directing a verdict upon *that* ground.

Certainly, the cartons are just as severable from the contained goods, and are as much severed, in value as are the outer, wooden, cases, which are conceded not to be dutiable in any form; or, at least, we so understand; though it may be that these come within the reasoning and scope of Judge Wallace's original opinion, which duties such paper boxes as an importation distinct from their contents.

In ordinary language, as well as in the sense in which the words are employed in the statute, these cartons are the "usual and necessary" covering of the class of goods imported by the plaintiffs.

That they are "usual" is fully proved.

The action of the government treats them as so necessary that without them the goods are not "in marketable condition;" though bearing a price and identity of their own.

Absolute physical necessity is not intended by the law. That is satisfied if the coverings are of a character so usual that it has become a business necessity for a merchant thus to envelope his goods, according to the usage of his branch of trade; or, in fact, if it is the *customary* covering. If "necessary" in this sense,

they are an adjunct to or charge upon, the goods they contain; and so not *separately* dutiable; nor any longer dutiable as a charge.

Chief-Justice MARSHALL'S definition of "necessary" is so familiar that we would not venture to quote it except to call attention to its exact application to the use of the word in section 7 of the act of 1883.

"Is it true, that this is the sense in which the word 'necessary' is always used? Does it always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is CONVENIENT, or USEFUL, or essential to another. The word 'necessary' is of this description. It has not a fixed character peculiar to itself; it admits of all degrees of comparison, and is often *connected with other words* which increase or diminish the impression the mind receives of the urgency it imports." * * * "This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them are all to be taken into view."

* * * * * *

"If the word 'necessary' was used in that strict and rigorous sense for which the counsel for the State of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning—to present to the mind the idea of some choice of means of legislation, not straitened and compressed within the narrow limits for which gentlemen contend."

McCulloch vs. Maryland, 4 Wheat., 413–5; 418–9.

Judge HARRIS held that a cause was "necessarily" upon the calendar, within the meaning of the Code, when it was "properly" there.

Sipperly vs. Warner, 9 Howard's Prac., 333.

And the New York Court of Appeals considered moneys to be "necessarily expended" where the expenditure was "reasonable, appropriate and *customary*."

People vs. Supervisors, 32 N. Y., 473, 475, 476.

Examples might be cited indefinitely; but we will assume it to be acceded to that these cartons and such similar coverings as *usually* protect importations, come within the meaning of section 7, whatever that meaning may be.

Concluding this portion of our argument we quote from a letter of A. P. Ketchum, Appraiser at the Port of New York, addressed to the Secretary of the Treasury, under date of April 11, 1883.

"When, therefore, the section (2906) says 'the actual market value or wholesale price thereof,' we understand that the word 'thereof' refers to the word 'merchandise' in the first part of the section. Whatever is *the merchandise proper of the invoice*, whether it be silks in the piece, hardware, hosiery, or anything else subject to an ad valorem duty, that duty is imposed upon the merchandise in question by virtue of section 2906. Whatever duty has been imposed upon *the other things* upon which ad valorem duty has been exacted, *in connection with such merchandise* as that referred to, has been imposed by virtue of the two following sections, which have been repealed."

"We come now, however, to the positive declarations of the new act of March 3, 1883. * * *

"The 'covering' may be of paper, as is usual with regard to many classes of merchandise, and not only usual but necessary to a proper preservation of the goods. The same is true as to *cartons*, boxes sacks and crates. This clause of section 7 seems to be a sort of blanket clause to make more clear, perhaps, than might otherwise appear the intention of Congress, to exclude from liability to duty the ordinary

coverings within which imported merchandise is usually found.

"The latter part of the first clause already quoted, viz., 'and hereafter none of the charges imposed by said sections or any other provisions of existing law shall be estimated in ascertaining the value of goods to be imported,' would probably have been sufficient if it had stood alone, to carry out the purpose of Congress, as indicated in connection with the charges referred to."

Report of Commission to consider questions under section 7 of the act of March 3, 1883, pp. 24–27.

Under R. S., section 2907, and similar earlier legislation on the subject of "charges," prior to March 3, 1883, duty had been assessed on the cost of cartons in which merchandise was imported *as a part of* the DUTIABLE value of *the merchandise* imported in them. If leather gloves, 50%; if cotton hose, 35%; and other rates according to the merchandise. By the act of March 3, 1883, Congress declared duties should no longer be assessed on the cost of the cartons according to the rate of duty imposed upon the merchandise contained in them. The Court at the trial agreed to this proposition as a correct construction of the Act; but proposed to treat the cartons *as independent articles of merchandise*, subject to their own rate of duty.

i. e. In an invoice of leather gloves, of cotton hose, of buttons and of watches:—the watches packed for safety in small wooden boxes; the leather gloves wrapped in tin foil; and the other goods in paper cartons;—under the old law the tin foil would be dutiable at 50%; the wooden boxes at 25%; the cartons at 35% or 25%—as they contained hose or buttons; in each case respectively as gloves, watches, hose or buttons. His Honor said in directing a verdict, this can no longer be done; but that the tin foil is dutiable, as a manufacture of metal at 45%; the cartons

as paper boxes at 35%; the wooden box at 35%, as a manufacture of wood; and that therefore the entry should be made in such a case of gloves, hose, buttons, watches, tin foil, paper boxes and wooden boxes.

This course, instead of diminishing the labor at the Customhouse, and the vexatious delay to the merchant, (which was the avowed ground for § 7, act of 1883—see Report of Commn.) increases both tenfold. The theory is, in actual business operations, impracticable.

We submit that the language of the act under consideration is not broad enough of itself to warrant any such determination; on the contrary the effect of the prohibition in the section is positive, that the value of such boxes shall *in no event* be estimated in assessing duty. The ruling under which a verdict was directed makes their value a portion of the value of the entire importation, and simply *changes the classification* from that of the goods they contain to what they would bear if separately imported.

We have argued that the value of the carton is not to be taken as a part of the value of the contained merchandise. On the further proposition that the carton itself is not liable to duty as a separate article of merchandise we submit, it is not *in fact* a separate article —and never as a paper box enters into the commerce of this country. The evidence show it to be a mere incident to the transportation and sale of the glove or stocking. There is no more inherent reason in assessing duty upon them than upon the value of the labor necessary to carry the hose from the factory to the ship. Duties are collected by force of positive enactment;—they do not arise of themselves.

In Reiche vs. Smythe, 13 Wall., 165, Mr. Justice Davis said:

"Congress having, therefore, defined the word in one act, so as to limit its application, how can it be

contended that the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an intention to produce such a result? Both acts are *in pari materia*, and it will be presumed that if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the latter act, in the absence of anything to show a contrary intention."

And in Smythe vs. Fiske, 23 Wall., 382, the Court gave weight to contemporaneous and long continued practice of the department. Now we find that, under the law providing for charges to be added to make dutiable value, uniformly, the cost of cartons has been treated as a charge to be so added. The law under which this is done is repealed; they still remain a charge and incident as much as before, but simply as such non-dutiable. How, we submit, do they become dutiable in view of established principles in the absence of positive legislation to that effect.

In the absence of specific and positive legislation the coverings incident to the importation of goods paying *specific* duty have never been held liable to duty, either as a part of such goods, or regarded as a separate importation; as has been already noticed.

The Chief Justice, in 1840, thus stated this proposition, in the leading case of Karthaus v. Frick, ever since universally accepted as a correct exposition of the law:

"The construction given to the law of 1832, at the custom-house of this place, at the time of its passage, was, that all salt paid the specific duty above mentioned and that the bags in which the fine salt was imported, were merely used as receptacles for the salt, like bags containing coffee, or hogsheads or barrels containing sugar or liquors, and that no duty was charged upon them.

In the last year, however, a different rule was adopted by the treasury department, and the collector, under instructions from Washington, now charges an *ad*

valorem duty on the sacks, *as manufactures of hemp*, in addition to the specific duty charged upon the salt. * * *

Inasmuch as it was the established custom, at the time this law was passed, always to import the fine salt in bags, *Congress must be presumed to have been fully apprised of it, and to have legislated with a full knowledge of the usual course of trade.*

The material in which merchandise is usually packed for the purpose of secure and CONVENIENT *transportation, has not*, in general, *been the subject of a separate impost.*"

Karthaus vs. Frick, Taney, 94, 95.

Whenever Congress has desired to make the covering dutiable, otherwise than as a charge upon the merchandise covered, it has done so by a specific provision in the schedules, as in the case of glass bottles.

Schmidt vs. Badger, 107 U. S., 85.
Merritt vs. Stephani, 108 U. S., 106.
16 Atty. Gen. Op., 268.

The Supreme Court held the principle applied by its Chief Justice to articles paying a specific duty equally applicable to those dutiable *ad valorem*.

Knight vs. Schell and Belcher vs. Linn, 24 How., 526–533.

The exhibits in this case (the cartons) show that they were designed for the particular goods imported in them. They bear the trade name, the style, the No., the color, and other marks; the result of which is to identify the packing with the merchandise.

Congress doubtless might have made cartons when filled dutiable at a particular rate, as it has done in respect to bottles; but our contention is that it has used no apt language to that end, and that a declaration that the cost of such incidentals to the merchandise imported should not be reckoned as a part of the dutiable value of that merchandise does not and cannot of itself operate as such an enactment.

The carton is no less an incident and part of the importation since March, 1883, than it was before.

The charges covered by Sect. 2907 are corporeal and tangible—like boxes, cartons, &c.,—and intangible, *e. g.* labor expended in respect to such merchandise and not capable of importation as a separate entity.

By the repeal we submit Congress intended to put all these charges upon the same footing and not to remit the tangible box to its dutiable category under the schedules of the act applying to such boxes when imported as a distinct and independent article of merchandise.

It certainly did not mean that the labor incident to fitting the carton for the merchandise and putting it into the carton should be so dutiable.

Under the original ruling of the court below, such incident to the hosiery trade becomes dutiable as a paper box.

In this connection we also submit that "putting up" has been by the statutes enumerated as a charge. *See ante*

The putting up of these gloves and hose in cartons for the American market comes within this phrase. As a dutiable charge or addition this is repealed.

Instruction on the part of the Secretary of the Treasury to include in the value of imported merchandise the cost of "putting up," "preparing" and "packing" for transportation or shipment, or to return in the value of the goods those costs or charges, or the coverings in which they are contained does not render the assessment any less illegal; he has no right to change the law, or make a new one; and to hold such putting up and preparing dutiable, though in another classification, is to ignore the statute.

There is hardly room for any misunderstanding of the terms used in Sec. 2907: All goods which are not shipped in bulk are "put up," "prepared" and "packed" in some shape or other for more conven-

ience of handling, carriage and shipping, and enclosed in some sort or kind of covering usual and necessary to meet the custom and usage of the trade for such purposes.

The "putting up," "preparing" and "packing" and the coverings which are of the manner and style, and of the kinds, or sort, as to material and form, in which such goods have usually been, and usually are, imported into the United States, and which are specially designed for such goods and are destroyed in the using, are as much within the law, as those goods whose inherent characteristics necessitate particular kind of coverings. The law makes no exceptions in that particular.

The proviso to Sec. 7, act of 1883, subjects to the penal duty of 100% any boxes or coverings "of any material or form designed to evade duties," or not used bona fide, etc.

We submit that there can be no possible doubt that Congress intended to apply this proviso to cartons in which gloves or stockings are imported if they are of such a character as to come within its terms. From this it follows that Congress could not have intended that cartons like those in the present case should be subject to duty as separate merchandise. If cartons containing merchandise are to be held liable to duty separately and independently as paper boxes, there is no possible style of cartons upon which, or conceivable contingency in which, the proviso can operate.

It equally follows that if this proviso so applies, then such cartons as are usual and customary are not liable to duty in any form.

Thus not only is the intention to abolish the duty upon these coverings *as a "charge"* avowed; but that they shall not be dutiable at all.

The expectation of reduced revenue could not have been entertained had the construction adopted by the court, when the verdict was directed, been contem-

plated; since the effect of this construction is to *increase* the duty, in very many instances; and, more especially, from the importation of the coarse goods, where the largest reduction was expected; *Ex gr.*, chemicals, dyestuffs, etc., etc. Vegetables afford another instance. Coming in at ten per cent., the effect of such construction is to raise the duty upon the barrels containing them to thirty-five per cent. as manufacturers of wood; though if they came in empty (and thus physically independent of all other merchandise) the duty would be but thirty per cent., since only *empty* barrels are enumerated. These illustrations might be multiplied indefinitely.

There is no reason, in law or logic, if this construction is correct, for confining its application to goods dutied *ad valorem*, or even to *dutiable* goods.

If the principle be once accepted, that the customary covering, used in good faith as the usual and necessary protection of merchandise, is, for the purpose of assessing duty, severable from the article it covers, and itself separately dutiable as merchandise, then this separation and independent appraisement is equally practicable and equally applicable to goods paying a specific duty and to those entitled to free entry, as well as those subject to duty *ad valorem*.

As already noticed, the sole reason for *not* making this separation in the case of imports paying a specific duty is that the vehicle and its contents constitute in law but one article of importation; and this is as true of our cartons and hosiery as it is of anything else.

The opinion orally given at the trial concluded:

"Duty was therefore collectible on them as paper boxes, and as the protest is not placed on the ground of an improper classification, I think the defendant is entitled to a verdict."

If the theory then advanced by the court, that these cartons are dutiable as paper boxes, was correct, we

submit that on the case presented, plaintiffs were, nevertheless, entitled to a verdict; because no question in respect to the duty upon cartons *as merchandise* is presented by the case.

The plaintiffs, acting on the theory that the cartons had no separate mercantile, commercial existence, made no entry of them. Their entry was simply two cases wool gloves, twenty cases cotton hosiery and one case of cotton hosiery.

It did not occur to the collector or appraiser that these cartons were merchandise; if it had, their duty is pointed out to them.

Art. 411 of the Treasury Regulations, p. 195, provides:

"If a package be found, on examination, to contain any article not specified in the invoice, or prohibited by law, the appraisers will make a special report, in writing, to the collector, with an expression of their opinion whether or not the omission was made, or the forbidden article introduced, with fraudulent intent on the part of the shipper, owner, or agent."

This is based on the following provision of the statutes.

"If any package be found by the appraisers to contain any article not specified in the invoice, and they or a majority of them shall be of opinion that such article was omitted in the invoice with fraudulent intent on the part of the shipper, owner, or agent, the contents of the entire package in which the entire may be, shall be liable to seizure and forfeiture on conviction thereof before any court of competent jurisdiction; but if the appraisers shall be of opinion that no such fraudulent intent existed, then the value of such article shall be added to the entry, and the duties thereon paid accordingly, and the same shall be delivered to the importer, agent, or consignee." Rev. Stats., Section 2901.

Until by the act of the importer or the collector an article is treated as a subject of entry, and claimed as

such to fall in some particular schedule, there is no ground for protest. The collector has made no classification of these cartons; he has simply treated them as a part of, or incident to the gloves or stockings, and (in violation of the Act of 1883) added their costs to the market value of the gloves or stockings in order to obtain a dutiable value on which to assess the rate of duty applicable to the gloves or stockings. Against that action the importers have protested in the amplest form.

When the cartons here are treated as an importation, then the importers must protest upon correct grounds under the decisions (Davies vs. Arthur, 13 Blatch, 34; 96 U. S., 148), or be barred of their action, although a different and higher than the correct *rate* has been assessed.

Here, these cartons have not been classified, and no duty upon them has been assessed. Moreover, as the case stands, the Government is in no condition to assess any duty upon them. When the Government takes the steps necessary to classify these cartons as an importation—by having the Appraiser make the return pointed out by the statute and regulations; and the Collector assesses them as paper boxes or manufactures of paper—the importers can then protest. Until that is done, whether or not they may dutiable of themselves is immaterial to the issue here.

What the Collector has hitherto done is to assess duty upon our gloves and stockings at an improper *amount*. We have protested against this action of the Collector.

We quote again the first ground of our protest:—"That under the Act of March 3, 1883, the cost or market value of said merchandise is alone duitable, whereas in ascertaining the dutiable value thereof, there has been illegally estimated and included as a part of such value charges expressly declared by section 7 of said Act to

be non-dutiable"—*i. e.*, we say the Collector had taken too much duty on our gloves. This the court then conceded he had done, and upon the exact ground stated in the protest. The plaintiffs are then entitled to recover the duty illegally exacted by the excessive duty on the gloves and stockings. That, on another account and on other merchandise, the Collector should have assessed a duty against us, is no reason why we should not recover this illegal duty on the particular merchandise which the protest refers to.

If the cartons are dutiable, they are dutiable on their own account. The amount of duty on the gloves stands on its own basis; and there is no ground for the establishment of a counterclaim or set off in behalf of the Government.

We fail to see the logic which says we shall not recover 40 per cent. duty assessed on an illegally enhanced valuation of gloves by the addition of the cost of the cartons in which they are packed, because of a claim that the cartons, *if entered as merchandise*, would be liable to a duty of 35 per cent. upon their value.

In conclusion upon this point:—The Government maintained that the gloves and stockings covered by this entry should be assessed at a valuation which adds to the market value thereof the cost of the cartons in which they were imported and the cost of packing them therein.

II.

The intent of Congress in the act of 1883 to abolish duties on charges is further apparent from the *change in the form of the oaths* required to be taken on the entry of the merchandise.

For sixty years prior to the act of 1883 the oaths required to be made, when the merchandise was entered by a consignee, importer or agent, contained the provision that the invoice "exhibited the actual cost if purchased, and the fair market value, if otherwise obtained, of the said goods, wares and merchandise, and of *all the charges thereon*." When the oath was made by an owner who had purchased the goods he was required to swear, "that the invoice which I now produce, contains a just and faithful account of the actual cost of the said goods, wares and merchandise of *all charges thereon*, including charges of purchasing, carriage, bleaching, dyeing, dressing, finishing, *putting up and packing*," &c.

When the goods had not been purchased, and the oath was made by the manufacturer or the owner, he was required to swear that the invoice contained a just and faithful valuation of the goods at their fair market value, "including charges of purchasing, carriage, bleaching, dyeing, dressing, finishing, *putting up and packing*, &c., and also a just and faithful account of all charges actually paid." *Act of 1823, 3 Stats., 730–2, Sec. 4.*

This section reappears in *Revised Statutes, Sec. 2841.*

[MEMO.—The *order* of these charges, as well as their *names*, indicates "putting up," as that which immediately follows the *finishing* of the goods, and *precedes* "packing" for transportation.]

The new oaths provided for by the act of 1883 to meet the altered state of affairs arising from the abolition of duties, on charges, *contain no provision whatever for charges*, unless finishing expenses of the goods themselves are considered as charges, which they properly and legally are not. The oaths only relate to the goods themselves. "That the invoice exhibits the actual cost (if purchased) or fair market value (if otherwise obtained) of the said goods, wares and mer-

chandise, including all cost for finishing *said goods, wares and merchandise to their* [the goods,] present condition."

Why did Congress strike out of the oath to be taken by the consignee, importer or agent the words "all the charges thereon?"

Why did Congress strike out of the oath to be taken by the owner the words "all charges thereon?"

Why did Congress strike out of the same form of oath the further words "including charges of purchasing, carriage, *putting up* and *packing*."

Plainly because Congress had in the next preceding section of the same act, prohibited the estimation of such charges in ascertaining the dutiable value of goods, and prohibited exaction of duties thereon.

Congress struck out the words "including charges of bleaching, dyeing, dressing, finishing" from the three oaths. Why? Plainly, because Congress substituted, in the Act of 1883, for a few of the processes of manufacture of the goods themselves, another phrase which was a substitute for and included the separate processes, to wit, the phrase "including all cost of finishing *said goods, wares and merchandise* to *their* present condition." That phrase includes bleaching, dyring, dressing, finishing, if the goods were in fact bleached, dyed, dressed, and finished; and if they were not, then the words show that the goods were bought at the stage of manufacture in which they are imported. The new phrase is therefore much better for that is always appropriate to whatever class of goods is entered, and to any stage of manufacture. The old phrase was only appropriate when the goods were in fact bleached, dyed, dressed and finished. Many goods come unbleached, undyed, undressed, unfinished.

The cost of bleaching, dyeing, dressing and finishing is not properly a charge at all. It is a part of the cost of the goods themselves, as much so, as spinning the

threads, or weaving the yarns of a yard of cotton cloth. It permanently inheres in the goods themselves, until they perish in the using.

In this connection we quote from the report of General Appraisers Ketchum and Rice and Deputy Collector Fiske to the Secretary, dated August 6, 1883:

"The distinction between expenses which are incurred in the finishing of goods, or the bringing of the fabric or other article purchased into the state required by the vendee, as, for example, the bleaching of cotton embroideries, and the finishing expenses connected with the stiffening or ironing of the same on the one hand, and the charges incidental to cartons, boxing, &c., on the other, is well understood by every merchant at all familiar with the importing business, and by every Government officer at all familiar with the practice of importers and the appraisement of imported merchandise.

"Cloths, for example, of many descriptions must be 'calendered,' as it is called, before they have upon the surface of the fabric a certain appearance or style, which is part, as indicated, of the finishing. Kid gloves, as usually imported, must be provided with buttons. Braids and similar articles that are to be cut to lengths suitable for the use of the vendee must be so cut to lengths before the article is considered finished for the purposes of the same. And so we might illustrate by many other references, but these are sufficient at once to suggest the difference between that which is known as a 'finishing expense,' described in the forms of oaths now in vogue, and the expenses incidental to packing, boxing, &c., covered by the provisions of the former tariff act which are now repealed."

See report of Commission appointed by the Secretary of the Treasury to consider questions under section 7, Act of 1883, page 21. (Appendix C.)

The reason of the substitution in the statute is obvious, and the intent of Congress to separate the goods from their wrapping and freight and other charges, ex-

ternal to the goods themselves, and to exact duties on the *goods only*, is well illustrated by this substitution.

III.

The exaction of the duty on the cost of packing the goods, to wit, on the cost of putting the paper boxes into the wooden cases, was illegal. At the date of plaintiffs' importation no law authorized this exaction, and the Court erred in directing a verdict for defendant on the charges, proven to have been paid for this labor.

Rec., 23, mid., and 27 ; beginning of fol. 48.

Section 2907 of the Revised Statutes expressly authorized a duty on this charge. It provided that in determining the dutiable value of merchandise there should be added to the cost or market value all actual or usual charges for "*putting up*," "*preparing*" and "*packing* for transportation or shipment." The putting the gloves into the cartons was strictly a "putting up" charge, and the putting the cartons into the cases was more properly a packing charge, but neither charge was dutiable. It was proven that plaintiffs' goods were put up in the cartons, and that the cartons were packed, for transportation and shipment, into the cases, and that the charges therefor were included in the cost of the goods. But section 2907 was repealed by the Act of 1883 and the estimation of the charges authorized by it for duty was forbidden.

The opinion of the Court below, it seems to us, can only be maintained upon one of the following false theories :

1st. That under the laws existing prior to the pas-

sage of the Act of March 3, 1883, the charges for putting up, packing and the coverings in which the goods are contained, were dutiable twice—once as part of the merchandise itself under Sec. 2906, and again as a charge to be added under Sec. 2907.

2d. That Secs. 2906 and 2907, respectively, provided for the ascertainable of dutiable value, independent of each other, and that the first included all the various items specified in the latter. That the value referred to in Sec. 2906 was the value as ascertained by the mode provided in Sec. 2907.

3d. That it is admissible at this time to put a different construction on the provisions of the repealed sections than was given them during the time they were n force and operation, by giving them now a narrower and more limited signification than they had when in force.

4th. That the repeal of a statute revives a prior one, without express words to that purpose, and contrary to the expressed affirmative declaration of the repealing statute.

5th. That the provisions of a new statute affirmatively declared shall not have force over those of an old one if in apparent conflict with them.

Any of which we deem too manifestly erroneous to comment upon.

The question presented in the trial below was whether the items of cost in question, viz.: the "paper boxes" and the "packing" were such as were dutiable as charges or coverings under Sec. 2907 and 2908, and Sec. 14, Act of June 22, 1874, or which were dutiable as charges.

The inquiry being answered in the affirmative, we were entitled to the verdict.

The Court erred in ruling that the agreed price of an article abroad is the dutiable value regardless if in that price is included items of cost for putting up, and packing, the coverings in which goods are packed, or

are to be packed, and which are specified on the invoice.

The Court erred in ruling that items of cost which form an integral part of the "*price*" of an article are dutiable, for the price may or may not include items of cost expressly declared by Sec. 7—to be non-dutiable—and when they are included in the price and the invoice shows that they are so included, and they form part of that price, then those items do not form part of the dutiable value of the article. It was the value fixed by Congress which was to be ascertained according to the rule fixed by Congress. Sec. 7, Act March 3, 1883, and Sec. 2902 R. S., and not the price fixed by the seller and buyer, as fixed by the Secretary of the Treasury.

The Court erred as to the finding of fact.

The stockings and gloves purchased were not bought at a price including the items of cost for the boxes and packing, nor did the invoice price include those items of cost.

The Court below referred in its first opinion to Sec. 9 of the new Act, as being in accord with the views as expressed therein. That section specially provides for merchandise only, whose market value cannot be ascertained to the satisfaction of the appraiser, and no claim is made by the appraiser that our importations were appraisable under that section.

The theory of the Customs officers adopted by the Court below, that Secs. 2900, 2002 and 2906, &c., in referring to wholesale price, or actual market value, had reference to the value of the goods in their put up, packed and covered condition, including the cost of such charges, is a new theory, the offspring of the Act of March 3, 1883, of which it was said by the Court in the case of Meyers vs. Shurtleff Federal Reporter Vol. 23, June 2, 1885, p. 580, which was a case involving the question of whether the barrels containing Portland cement formed part of the value of the cement,

which had been appraised under the very ruling of the department we here complain of as comprising "the preparation of the cement for sale." "But when it is "considered that the Act of 1883 not only repeals Sec. "2907 R. S. authorizing the value of the cask to be "added to that of the cement, but also expressly pro- "hibits the value of the former to be estimated as part "of the value of the latter in determining the amount "of duties for which it is liable, the case is too plain "for argument. The mere statement of it is sufficient, "there is no room for construction or difference of "opinion." (Ante, p. 52.)

The foregoing points also apply to charges for putting up and packing, as well as to charges for boxes.

IV.

Officers of the Treasury Department claim that although the contention of the plaintiff on the main question may be tenable, nevertheless the plaintiffs are still liable to the duty as assessed by reason of the last clause of Section 2900 of the Revised Statutes—This provision is—"The duty shall not, however, be assessed upon an amount less than the invoice or entered value."

We answer—

(1.) This provision applies only to the invoice or entered value of the merchandise.

(2.) The invoices in the present case do *not* include the charges, so claimed, in the price of the goods.

(3.) If this section, as it reads, stands in the way, then it is repealed. It is one of the unnamed provisions expressly repealed by Section 7 of the Act of 1883. Bank vs. Hale, 59 N. Y. 53, 57.

Under the laws in force prior to the passage of the Act of March 3, 1883, the stockings, and the boxes were dutied as one thing—the boxes as part of the stockings being added to the value of the stockings, to arrive at a dutiable value of the whole.

When the provisions of law under which this was done were repealed, the stockings and boxes were no longer to be treated as one, and the stockings and the boxes were respectively left to the special or general provisions of law applicable to each—the stockings were specifically provided for in Sched. "I," and the boxes were under the provision of Sec. 7,—non-estimatable as part of the value of the stockings—or as merchandise; or in any way.

The question presented is not one which could have been settled by re-appraisement—for the question was one involving a mixed question of law and fact, and the Secretary of the Treasury having established the standard for the valuation of imported merchandise to include their value in their put up, packed, and covered condition, including the cost of putting up, preparing, and packing—and the coverings in which they are contained; the standard so established became binding on all Treasury offices, including the general appraiser. They have no prerogative under the law to overrule the regulations established by the Secretary of the Treasury for the appraisal of merchandise.

But it is *not* binding on the merchants, who can submit and have adjudicated here the question of the legality of that standard, raised by their protest.

Betts, J., speaking for himself and Nelson, J., thus commenced an opinion:

"The appraisement was void in law and did not justify the defendant," etc.

Morlot vs. Lawrence, 3 Blatch., 123.

Such an appraisal no defense.

Vaccari vs. Maxwell, *Id.*, 377, close of Op.

"*Insufficient to displace the value declared on the entry.*"

Sampson vs. Peaslee, 20 How., 376.

"INGERSOLL, J.: The reappraisal must stand as valid, *unless* a sufficient reason to make it invalid is particularly pointed out to the Collector in the protest; and unless *that* reason, so particularly and specifically pointed out, is sustained by the proof."

Schmaire vs. Maxwell, 3 Blatch., 409.
BETTS, J., in Crowley vs. Same, *Id.*, 385, top.

In another case, reported in the same volume, before NELSON and BETTS, JJ.:

"The Court held: 1. That the official appraisal, not appealed from, was conclusive as to the dutiable value of the goods, when the protest *did not point out any violation of law* in making the appraisement."

Roller vs. Maxwell, *Id.*, 142.
Lowenstein vs. Same, 2 *Id.*, 404.
Frazer vs. Moffit, 18 Fed. Rep., 584.
Arthur vs. Morgan, 112 U. S., 501.

Repudiating the departmental "instructions" as to the use of the polariscopic test of sugars, the Supreme Court observed: "Congress alone has the authority to levy duties. Its will is alone to be sought;" and, in the course of the opinion, thought it advisable to quote the maxim that "where law ends tyranny begins."

Merritt vs. Walsh, 104 U. S., 700, 702, *et seq.*
Campbell vs. U. S., 107 *Id.*, 412.

Nor had the secretary any authority to exact duty upon charges when their amount was included in the cost of the goods in the invoice. Congress had said they should not be dutiable at all; and no regulation of his could introduce an exception.

U. S. vs. May, 3 Mason, 98.

V.

In view generally of defendant's argument on the motion for new trial, not knowing what will be presented here, we add, possibly repeating views before urged: That the appraiser, under the rulings of the Department of some years' standing, §§ 3735, Oct. 4, '78, and 3861, Jany. 25, '79, reported on the invoice the cost of cartons and packing and the collector under the Department's ruling of May 15, '83, assessed duty thereon; as a part of the market value of the hosiery.

Our understanding of the law of Mch. 3, '83, is: *That the dutiable value of imported merchandise is its actual market value or wholesale price at the period of exportation to the United States in the principal markets of the country from which the same has been imported in its finished condition as it exists prior to being put up, prepared and packed for inland carriage or ocean shipment to the United States, and that coverings of whatsoever kind, into which goods are usually packed, shall not be estimated as part of the value of their contents in estimating the values for which such contents are liable nor shall their value be estimated for assessment of duty as a separate commodity and as part of the goods imported, but shall be treated as a nonentity.*

It follows therefore that the goods on this invoice were dutiable at their value in the shape they were in before they were packed in the cartons.

It was the duty of the collector to cause the appraiser to return the value of the hosiery proper, separate and independent of these charges, and to have assessed duty only upon such value, in accordance with the provisions of Sec. 2906 R. S. as modified by Sec. 7 of the Act of March 3, 1883.

Any assessment of duty on the amount of these charges as hosiery by whatever subterfuge, or means

effected, is contrary to the spirit and the terms of this Act.

It was as much the duty of the collector to cause the dutiable value of the hosiery to be returned separately, as it is his duty to cause the value of perfumery (when the invoice value does not state separately the value of the bottles, which the law makes dutiable separate from the contents) to be returned separate and apart from the bottles, or of paintings when imported already framed upon which the law makes provisions for the paintings and for the frames separately.

The complications and apparent inconsistencies, evidently resulting from what seems to us an attempt to ignore plain statutory provisions, may be judged in some degree by examination of the conflicting decisions of the Treasury Department. We cite the following, S. S. 5806, July 7, 1883:

Resort to appraisal under Sec. 9 shall only be had when value cannot otherwise be ascertained.

S. S. 6229. Barrels containg cement are part of dutiable value of the cement.

Ruled otherwise by DEADY, J., and *acquiesced in by the Department.*

S. S. 6335. Boxes containing soap are part of dutiable value.

S. S. 6387. Cartons containing artificial flowers are *not* part of dutiable value.

S. S. 6471, July 19, '84. Barrels containing olive oil are *not* part of the dutiable value.

S. S. 6535, Aug. 19, '84. Boxes bath bricks are not.

S. S. 6568, Sept. 22, '84. Tin cases chloride of Lime are not.

S. S. 6575, Sept. 25, '84. Screwing, marking and shipping Bales of Jute Bags are part of dutiable value of Bags.

S. S. 6633. Nov. 6, '84. Casks containing Salt cakes are dutiable as part of the contents.

S. S. 6647, Nov. 19, '84. Sacks containing Rice Flour are no part of the dutiable value of the Flour.

S. S. 5641, Apl. 4, '83. The *time* and *place* of *exportation;* (value at) shall govern.

S. S. 5659, Apl. 12, '83. Charges for packing and transportation on invoices of goods paying different rates must be apportioned.

S. S. 5955, Oct. 16, '83. Boxes and packing charges of certain fruits not dutiable value.

S. S. 5963, Oct. 22, '83. Onions in boxes; boxes not part of value of onions.

S. S. 5987, Nov. 2, '83. Baling for Burlaps not part of dutiable value.

Letter to Collector at New York, published July 3, '85:

As to matters of fact confided to their judgment the action of the appraisers is conclusive; but they have no prerogative to violate the law.

It was to control their action in this very matter that Sec. 7 was put into the Act of 1883.

It is not competent to show their appraisal merely excessive; it is competent to show it illegal.

Undoubtedly, they are to ascertain what are the principal markets of a country, in case of doubt or question; but if they take the markets of the wrong country, their action is illegal and reviewable. In Belmont vs. Lawrence, 3 Blatch., 120, it was said that if the fact had been made known to the appraisers that the quicksilver was the product of Spain, their erroneous adoption of the London market-value, as the basis of assessment, would have been reviewable upon protest.

I. e., if they disobey the law, their action will be reversed by the Court.

If they act within the law, their judgment, as to value, is conclusive.

It is for the Court to say whether they acted legally; not whether they acted wisely.

As Judge CURTIS observed in Burgess vs. Converse:

"It was not intended or designed by Congress merely to protect the revenue by preventing undervaluation. They meant also to protect the fair trader against overvaluation." * * "It was argued that the appraisers themselves were the Judges what examination was necessary," &c. * * "This would be true, if the law had prescribed no rule on the subject. But, in my opinion, the section above cited has prescribed a rule, which the collector and appraisers must conform to" * * "I think also that under a protest declaring that the appraisers did not faithfully examine the goods, these facts may be shown." 2 Curtis, 221–2.

This judgment was affirmed in the Supreme Court, Judge CAMPBELL giving its opinion, in the course of which he used this language:

"The collector (plf's. intestate) objected to this evidence, and claimed that the decision of the appraisers was in the nature of an award, and final under the Statute," &c. * * * "These *acts of Congress* provide for the appointment, regulate the duties, and impose the limitations on the authority of the appraisers, and *determine the conditions on which the validity of their assessment depends.* All their powers are derived from these acts, and it is their duty to observe the restrictions, and to obey the directions they contain." * * "We are, therefore, of the opinion that the importer was *not precluded by their return* from disputing the sufficiency or accuracy of their assessment;" which he did, upon the ground that they had not made the requisite statutory examination of the goods."

Greeley vs. Burgess, 18 How., 415–6.

Below are some of the instances of recoveries because the appraisers disregarded the rules the statute prescribed to them.

Tucker vs. Kane, Taney, 146.

In the above-cited case they did not make proper examination.

They erred as to the *place* of valuation in

Thompson vs. Maxwell, 2 Blatch., 385.
And in Morlot vs. Lawrence, 3 *Id.*, 122.

As to *time* of valuation in Griswold vs. Lawrence, 1 Blatch., 599.

As to the foreign currency indicating value,

Lowenstein vs. Maxwell, 2 *Id.*, 401, 404.
Alsop vs. Same, 3 *Id.*, 399.

As to quantity, not allowing leakage. Schuchardt vs. Lawrence, *Ib.*, 397.

In several cases in the Circuit Court the recovery has been because of the unauthorized addition of "charges" by the appraisers.

Grinnell vs. Lawrence, 1 Blatch., 346.
Griswold vs. Maxwell, 3 *Id.*, 145.
Vaccari vs. Same, *Ib.*, 368.

VI.

For the same reasons, "the views of the secretary," (meaning the Customs Bureau of this Department) cannot control the law. The multitudinous tariff decisions are so many instances of erroneous "views."

Indeed, it is these "views," and not those of the appraisers themselves, that procured the action against which we protest. We did not have that "judgment" of the appraisers which the district-attorney first claimed on the argument for new trial should conclude us; since they "were acting under that general treasury circular, dated May 15, 1883, numbered 5706" (Rec., page 28 bottom); and were so acting *contrary* to their own judgment, as Gen. Ketchum's *et als.* report shows.

It was long ago held in the Circuit Court (per NELSON and BETTS, JJ.) that the secretary had no power to direct as to the addition of charges under former legislation; nor as to time of valuation, etc.

Gray vs. Lawrence, 3 Blatch., 117.
Lennig vs. Maxwell, *Ib.*, 126–7.
Maillard vs. Lawrence, *Ib.*, 378.

Of a much more recent "regulation," SAWYER, J., says:

"It is difficult to see where the Secretary obtains authority to require what the statute does not."

Balfour vs. Sullivan, 17 Fed. Rep., 232, bottom.
See also, page 233.

"Tin cans, containing oil and having a small opening All th
n the top, through which the oil may be poured, belongs
are regarded as being incidental to the transportation merely, not dutiable at 100 per cent. nor part of the value of the merchandise."

Many others equally inconsistent might be cited.

Difficulty also arises from the theory adopted by the Government officers that the value of the goods must be taken to include the coverings in which they are in when bought and sold abroad.

This view worked inequality in assessing value under the Act of 1865. It was one of the purposes of Congress to cure this very inequality that led to the adoption of the rule laid down in Sec. 7 of the new Act, and its affirmative declaration, if carried out would be an effectual cure. Questions as to whether the importer had purchased the goods in bulk and had put them up and packed them himself, or had bought them already put up and packed, would not need to be inquired into, and like goods, put up and packed in like manner, would not be required to be appraised at different values.

The spirit and the letter of the new Act plainly

shows, as we submit, that Congress intended to avoid this inequality, that it intended to have all goods imported into the United States assessed at their net prime or naked value, whenever that value could be ascertained by the appraising officers without regard to the private arrangements or special contracts or understanding between the seller and purchaser.

This is the reasonable and equitable construction. It is in harmony with the letter, the spirit of the law, with its affirmative declaration, and with the rulings of the Treasury Department as to what were hitherto charges.

The new law was passed in the light of the construction and practical working of the old, the effect of the new is not to be avoided upon the theory that if the old law had been otherwise construed the ill complained of would not have been within the curative remedy of the new.

Under the former duties would have been collected on the cartons in question as "charges."

The new law in repealing all parts of existing laws, by or through which duty on "charges" were exacted did not convert such "charges" into merchandise.

The Department also seems to us to incorrectly construe in application the terms "market-value in the principal markets of the country from which the same has been imported."

Government officers seem to have in mind some physical market place where goods are bought and sold (as of old), or like our modern family markets where daily supplies may be purchased. This theory is shown by the phrase "held for sale" or "marketable condition" as applied by the Government officers.

The "*principal markets*" as used in the statutes has reference to cities or sections of countries wherein such goods are mostly procured and dealt in; "*the market price*" is the price at which the goods (the goods them-

selves) can be procured in such districts. This price is ascertained usually by printed price currents sent around by the manufacturers direct or through commission merchants, who do not hold them for sale, but simply take orders which they turn over to the manufacturers, so that as a matter of fact goods are more usually manufactured on orders rather than made to be held for sale, and it is the price or value, which obtains among these first dealers, which is to govern, and not the price of the retail storekeepers or second or third-hand dealers or jobbers.

The law does not provide for the value of goods in the condition as they are held for sale by storekeepers, retail dealers, with respect to their putting up and packing and the coverings in which they are contained. On the contrary it provides for the value which obtains among the first dealers, in which value such items shall not be estimated.

VII.

In conclusion:

If these cartons are *now* part of *market* value, they were so *before* March 3d, 1883.

(1.) The government *must*, therefore, maintain that prior to that day, R. S., Sec. 2906, *authorized* their inclusion once, as part of the *market* value, and Sec. 2907 *required* their inclusion a second time as part of their duitable value.

(2.) That R. S., Sec. 2906 and 2907 prescribed *separate* rules for dutying merchandise; and did not together form one system.

(3.) That the repeal (by act of 1883) of one statute revives (substantially) a prior statute (Act of 1865)

without express words to effect this; Judge Wallace declaring of this act of 1883:

"Its effect is to abrogate section 9 of the act of March 28, 1866 (section 2907), *and restore* the provisions of section 7 of the act of March 3, 1865. While it abrogates the existing provisions for determining dutiable value, it does not contemplate prescribing any new rule for ascertaining market value."

Their argument, therefore, *all* depends upon the *false* assumption that these cartons were part of the *market* value under pre-existing law.

(4.) We have shown conclusively that, by uniform practice and uniform rulings of the Department, cartons were deemed a *charge*, under the repealed acts, *additive to market value.*

When the acts were repealed they could not by the repeal alone be enacted into an element of market value.

(5.) More than that the Act of 1883 affirmatively declared that whatever had theretofore been charges should not thereafter in any form be subject to duty.

erings, of any kind."

EDWIN B. SMITH,
STEPHEN G. CLARKE,
WILLIAM STANLEY,
Of Counsel.

CHARLES CURIE,
Plaintiff's Attorney.

APPENDIX A.

For convenience of reference we append an abstract of the legislation on the subject of charges.

The plaintiff's protest and suit are based upon the seventh section of the Act of March 3, 1883, C. 121, (22 Stats., 523), which provides:

"SEC. 7. That sections twenty-nine hundred and seven and twenty-nine hundred and eight of the Revised Statutes of the United States, and section fourteen of the act entitled, 'An Act to amend the customs revenue laws and to repeal moieties,' approved June twenty-second, eighteen hundred and seventy-four, be, and the same are hereby repealed, and hereafter none of the charges imposed by said sections, *or any other provisions of existing law*, shall be estimated in ascertaining the value of goods to be imported, *nor shall the value of the usual and necessary sacks, crates, boxes or covering* of *any* kind be estimated as part of their value in determining the amount of duties for which they are liable:

Provided, that if any packages, sacks, crates, boxes or coverings of any kind shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the *bona fide* transportation of goods to the United States, the same shall be subject to a duty of one hundred per centum *ad valorem* upon the actual value of the same." 22 Stats., 523.

The sections thus specifically repealed should be carefully considered.

SEC. 2907. In determining the *dutiable* value of merchandise, there shall be *added to* the cost or to the actual wholesale price or *general* market value at the time and place of exportation in the principal markets of the country from whence the same has been imported into the United States, the cost of transportation, shipment and trans-shipment, with all the expenses included, from the place of growth, production or manufacture, whether by land or water, to the vessel in

which shipment is made to the United States; the value of the sack, box, or covering of any kind in which such merchandise is contained; commission at the usual rates, but in no case less than two and one-half per cent.; and brokerage, export duty, and *all other actual or usual charges* for PUTTING UP, *preparing and packing* for transportation or shipment. All charges of a general character incurred in the purchase of a general invoice shall be distributed *pro rata* among all parts of such invoice; and every part thereof charged with duties, based on value, shall be advanced according to its proportion, and all wines or other articles paying specific duty by grades shall be graded and pay duty according to the actual value so determined.

SEC. 2908. All additions made to the entered value of merchandise for charges shall be regarded as part of the actual value of such merchandise, and if such addition shall exceed by ten per centum the value declared in the entry, in addition to the duties imposed by law, there shall be collected a duty of twenty per centum on such value." * * *

[The omitted portion relates only to wool duties.]

The repealed section of the Moiety Act is:

"SEC. 14. That wherever any statute requires that, to the cost or market value of any goods, wares, and merchandise imported into the United States, there shall be added to the invoice thereof, or, upon the entry of such goods, wares, and merchandise, charges for inland transportation, commissions, port duties, expenses of shipping, export duties, cost of packages, boxes, or other articles containing such goods, wares, and merchandise, or any other incidental expenses attending the packing, shipping, or exportation thereof from the country or place where purchased or manufactured, the omission, without intent thereby to defraud the revenue, to add and state the same on such invoice or entry shall not be cause of a forfeiture of such goods, wares and merchandise, or of the value thereof; but in all cases where the same, or any part thereof, are omitted, it shall be the duty of the collector or appraiser to add the same, for the purposes of duty, to such invoice or entry, either in items or in gross, at such price or amount as he shall deem just

and reasonable (which price or amount shall, *in the absence of protest*, be conclusive), and to impose and add thereto the further sum of one hundred per centum of the price or amount so added; which addition shall constitute a part of the dutiable value of such goods, wares, and merchandise, and shall be collectable as provided by law in respect to duties on imports." 18 Stats., 189.

How arbitrarily and variously Congress (exercising its constitutional right. Tappan vs. U. S., 2 Mason, 396), has prescribed, from time to time, the method of ascertaining the "dutiable" value of goods generally and, exceptionally, of particular commodities is seen by the following summary of the statutory provisions relating thereto from the very earliest legislation down to this Act of March 3, 1883, C. 121.

The first Act passed by a Federal Congress was one prescribing the oath of office to be taken by its functionaries. The second was designed to provide means for carrying on the newly installed government by levying a duty upon imports.

This, the first, tariff act imposed as duty upon all non-enumerated goods, "five per centum on the value thereof at the time and place of *importation*." Act July 4, 1789, C. 2, § 1 (1 Stats., 26).

The Act of July 31, 1789, C. 5, § 13, required the importer, in making entry to produce the original invoice, and state, "an account of *the nett prime cost*" of the goods, as the basis of assessing the duties. (1 Stats., 40, top). Sec. 17 (*Id.*, 41) enacted that the duty, at the place of *importation*, "shall be estimated by adding 20% to the *actual cost*," if from the Cape of Good Hope or beyond; "and ten per cent. on the actual cost thereof, if imported from any other place or country, *exclusive of all charges*."

Repeated, *in totidem verbis*, as Sec. 39 of the Act of Aug. 4, 1790, C. 35 (*Id.*, 167).

By the third section of the Act of Jan. 29, 1795, C. 17, it was enacted:

"That after the said last day of March, the valuation of all goods, wares and merchandise, subject to the payment of duties *ad valorem*, shall be made upon the actual cost at the place of *exportation*, including all *charges* (commissions, *outside* packages and insurance only *excepted*), that the duty on any wines imported into the United States shall not be less than ten cents per gallon, and that bottles, in which any liquor is imported, shall be subject to the payment of the like duty as empty bottles" (*Id.*, 411).

The Act of March 2, 1799, C. 22, § 61, reiterates § 13 of the Act of July 31, 1789, and § 39 of the Act of Aug. 4, 1790—thus returning to the net cost, *exclusive* of charges, with a percentage added (in lieu of the precise charges) as the basis for the assessment of duty (*Id.*, 673).

The *provisos* of the *fourth* paragraph of the first section of the Act of April 27, 1816, C. 107, declare:

"*Provided*, That all cotton cloths of which cotton is the material of chief value (excepting nankeens, imported directly from China), the *original cost* of which at the place whence imported, *with the addition* of twenty per centum, if imported from the Cape of Good Hope, or from places beyond it, and of ten per cent. if imported from any other place, shall be *less than twenty-five cents* per square yard, shall, with such addition, be taken and *deemed to have cost twenty-five cents* per square yard, and shall be charged with duty accordingly. Provided also, that all unbleached and uncolored cotton twist, yarn or thread, the original cost of which shall be less than sixty cents per pound, shall be deemed and taken to have cost sixty cents per pound, and shall be charged with duty accordingly; and all bleached or colored yarn, the original cost of which shall have been less than seventy-five cents per pound, shall be taken and deemed to have cost seventy-five-cents per pound, and shall be charged with duty accordingly. And provided further, that cotton piece goods imported in ships or vessels of the United States which shall have sailed from the

United States before the passage of this act and shall arrive therein between the thirtieth day of June, one thousand eight hundred and sixteen, and the first day of June, one thousand eight hundred and seventeen, the original cost of which cotton piece goods at the place whence imported shall have been less than twenty-five cents per square yard, shall be admitted to entry, subject only to a duty of thirty-three and a third per centum on the cost of the said cotton piece goods in India, and on the usual addition of twenty per centum on that cost" (3 Stats., 311).

The fifth paragraph of the same section concludes:

"And in all cases where an *ad valorem* duty shall be charged, it shall be calculated on the *net* cost of the article at the place whence imported (exclusive of *packages*, commissions and *all* charges) with *the usual addition* established by law, of twenty per cent. on all merchandise, imported from places beyond the Cape of Good Hope, and of ten per centum on articles imported from all other places" (*Ib.*).

Upon the third day of March, 1817, there was approved "An Act supplementary" to the foregoing, its text *entire* being:

"That in all cases where an *ad valorem* duty shall be charged, it shall be calculated on the *net* cost of the article at the place whence imported (exclusive of *packages*, commissions, *charges of transportation*, *export duty*, and all other charges) with the usual addition, established by law, of twenty per cent. on all merchandise imported from places beyond the Cape of Good Hope and of ten per cent. on articles imported from all other places" (3 Stats., 369).

The fourth section of the Act of April 20, 1818, C. 79, makes still a different requirement, in its concluding line, viz.:

"SEC. 4. That the *ad valorem* rates of duty upon goods, wares and merchandise shall be estimated by adding 20% to the actual cost thereof, if imported from the Cape of Good Hope, or from any island, port or place beyond the same, and 10% on the actual cost

thereof if imported from any other place or country *including all charges, except commissions, outside packages and insurance*" (3 Stats., 434).

The fifth section of the Act of March 1, 1823, C. 21, is more elaborate in its directions upon this subject:

"SEC. 5. That the *ad valorem* rates of duty upon goods, wares and merchandise shall be estimated in the manner following: To the actual cost, if the same shall have been actally purchased, or the actual value, if the same shall have been procured otherwise than by purchase, at the time and place, when and where purchased or otherwise procured, or to the appraised value, if appraised, except in cases where goods are subjected to the penalty provided for in the Thirteenth Section in this Act, shall be added all charges, except insurance; and also, twenty per centum on the said cost or value and charges, if imported from the Cape of Good Hope, or any place beyond that, or from beyond Cape Horn, or ten per centum if from any other place or country; and the said rates of duty shall be estimated on such aggregate amount; *Provided*, that in all cases where any goods, wares and merchandise, subject to *ad valorem* duty, shall have been imported from a country other than that in which the same were manufactured or produced, the appraisers shall value the same at the current value at the time of exportation, in the country where the same may have been originally manufactured or produced" (3 Stats., 732–3).

This enactment, in its preceding (fourth) section prescribes, for the first time, the precise *form* of the oath to be taken upon the entry of importations—as will be hereafter further noticed.

The "*second*" paragraph of the first section of the Act of May 22, 1824 (4 Stats., 26), C. 136, contains provisos similar to those of the Act of April 27, 1816.

The third paragraph of this section imposes a duty "on wool unmanufactured," increasing in successive years from 20 to 25 and 30 per centum *ad valorem* "*Provided*, that all wool the *actual* value of which, at *the place whence imported*, shall not exceed ten cents

per pound, shall be charged with a duty of fifteen per centum and no more" (*Ib.*).

The fourth paragraph places the duty of fifty per centum upon all hats and hat material of leghorn, straw, chip or grass.

"*Provided*, that all leghorn hats," &c., "which, at the place whence imported, *with the addition of ten per centum*, shall have cost less than one dollar each, shall, *with such addition*, be taken and deemed to have cost one dollar each, and shall be charged with duty accordingly" (4 Stats., 26).

The Act of May 19, 1828, C. 55, Sec. 2, item "First," says: "And all wool imported on the skin shall be *estimated* as to weight and value, and shall pay the same rate of duty as other imported wool" (4 Stats., 271).

Item "*Second*" of this section concludes with the proviso "that on all manufactures of wool, except *flannel and baizes*, the *actual value* of which, *at the place whence imported*, shall not exceed 33⅓ cents per square yard, shall pay 14 cents per square yard" (*Ib.*).

Item "Third" declares that

"All manufactures of wool or of which wool is a component of chief value, *except as aforesaid*, the *actual* value of which, *at the place whence imported*, shall exceed fifty cents the square yard, and shall not exceed one dollar the square yard, shall be *deemed to have cost one dollar* the square yard," etc. (*Ib.*).

"Fourth." All such goods, the actual value of which exceed $1 and does not exceed $2.50, shall be deemed to have cost two dollars and fifty cents per square yard (*Ib.*).

"Fifth." Exceeding $2.50, and not over $4, deemed to cost $4 (*Ib.*).

The cotton provisions of this Tariff Act were similar, *vide* Sec. 7 (4 Stat., 273).

This act in the next section (§ 8) provides for the first time for the ascertaining by appraisement the actual

value of imported merchandise, and also provides that to this actual value, to obtain dutiable value, certain additions shall be made including "*all charges except insurance.*"

Prior to this time *cost* with or without various additions thereto as Congress vacillated had, in the absence of fraud, been the standard for the assessment of duty.

"SEC. 8. That, in all cases where the duty now is, or hereafter may be, imposed on any goods, wares, or merchandise, imported into the United States, shall, by law, be regulated by, or be directed to be estimated or levied upon the value of the square yard, or of any other quantity or parcel thereof; and in all cases where there is or shall be imposed any *ad valorem* rate of duty on any goods, wares, or merchandise, imported into the United States, it shall be the duty of the collector within whose district the same shall be imported, or entered, to cause *the actual value* thereof, *at the time purchased*, and *place from which the same shall have been imported* into the United States, to be appraised, estimated, and ascertained, and the number of such yards, parcels, or quantities, and such actual value of every of them, as the case may require: And it shall, in every such case, be the duty of the appraisers of the United States, and of every of them, and of every other person who shall act as such appraiser, by all the reasonable ways and means in his or their power, to ascertain, estimate, and appraise the true and actual value, any invoice or affidavit thereto, to the contrary notwithstanding, of the said goods, wares, and merchandise, at the time purchased, and place from whence the same shall have been imported into the United States, and the number of such yards, parcels, or quantities, and such actual value of every of them, as the case may require; and all such goods, wares, and merchandise, being manufacture of wool, or whereof wool shall be a component part, which shall be imported into the United States in an unfinished condition, shall, in every such appraisal, be taken, deemed, and estimated by the said appraisers, and every of them, and every person who shall act as such appraiser, to have been, at the time purchased, and place from whence the same were imported into the United

States, of as great actual value as if the same had been entirely finished. *And to the value of the said goods, wares, and merchandise*, so ascertained, there shall, in all cases where the same are or shall be charged with an *ad valorem* duty, be added *all charges, except insurance*, and *also* twenty per centum on the said *actual value* and *charges*, if imported from the Cape of Good Hope, or any place beyond the same, or from beyond Cape Horn; or ten per centum if from any other place or country; and the said *ad valorem* rates of duty shall be estimated on such aggregate amount, anything in any act to the contrary notwithstanding." (4 Stats., 273–4).

The "first" provision (Sec. 2) of the Act of July 14, 1882, imposing duties is that if fine wool is, by reason of an admixture of dirt or other material, reduced in value to eight cents per pound, or under, the appraisers shall appraise said wool at such price as, in their opinion, it would have cost had it not been so mixed," etc. (4 Stats., 583).

The cotton clause is the "third" of this section. It provides—"That all manufacturers of cotton * * * not exceeding in value 30 cents the square yard, shall be valued at 30 cents;" * * * not exceeding 35 cents valued at 35 cents (4 Stats., 585–7). Section 7 of this act relating to appraisals, repeats the provision of the same numbered section of the preceding act (which see *supra*), that unfinished manufactures of wool shall be deemed of as great value as if finished (4 Stats., 591–2).

Section 13 repeats the provision of the third section of the Act of May 28, 1830, C. 147 (*Id.*, 409), "that whenever goods composed wholly or in part of wool or cotton, of similar kind but different quality, are found in the same packages, charged at an average price, it shall be the duty of the appraisers *to adopt the value of the best article* contained in such package and so charged, *as the average value of the whole*," etc. (4 Stats., 593).

Act of July 14, 1832, provides:

"Section 15. That from and after the said third day of March, 1833, the *ad valorem* rates of duty on goods, wares and merchandise shall be estimated in the manner following: to the *actual cost*, if the same shall have been actually purchased, or the *actual value*, if the same shall have been procured otherwise than by purchase, at the time and place when and where purchased, or otherwise procured, or to the appraised value, if appraised, *shall be added all charges*, except insurance" (4 Stats., 593).

Item "First" of the Act of June 30, 1842, C. 270, Section 1, reproduces the substance of the same items of the Acts of May 19, 1828, and of July 14, 1832, and of section 13 of this last-named act (5 Stats., 548).

The second section, "second" and "third" items, follows the requirements of previous legislation (*ubi sup.*), that cotton goods with certain exceptions, *not* dyed, &c., not exceeding in value twenty cents, shall be valued at twenty cents; if dyed, &c., not exceeding in value thirty cents shall be valued at thirty cents, excepting that velvets and some other goods made in a specified way, not exceeding thirty-five cents, shall be valued at thirty-five cents (5 Stats., 549). It also, as in earlier acts, fixes an arbitrary valuation for different grades of cotton goods (5 Stat., 549).

This act first fixes the principal markets as the place of valuation, viz.:

"Sec. 16. That in all cases where there is, or shall be, imposed any *ad valorem* rate of duty on any goods, wares, or merchandise, imported into the United States, and in all cases where the duty imposed shall by law be regulated by, or directed to be estimated or based upon, the value of the square yard, or of any specified quantity or parcel of such goods, wares or merchandise, it shall be the duty of the Collector, within whose district the same shall be imported or entered, to cause the actual market value or wholesale price thereof, at the time when purchased, in the principal markets of the country from which the same

shall have been imported into the United States, or of the yards, parcels or quantities, as the case may be, to be appraised, estimated, and ascertained, and to such value or price to be ascertained in the manner provided in this act shall be added *all costs and charges except insurance*, and including, in *every* case, a charge for *commissions* at the usual rates as the true value at the port where the same may be entered upon which duties shall be assessed" (5 Stats., 563).

The eighth section of the Act of July 30, 1846, C. 74, allows the owner to add to the actual cost to him of the article imported, and to its invoice value, whatever may be necessary to raise it to the *requisite* market value; "and to add thereto all *costs and charges* which, *under existing laws*, would form part of *the true* value" *at the port of entry;* thus differentiating in terms the *dutiable* value from all other values. The whole section reads:

"SEC. 8. That it shall be lawful for the owner, consignee or agent of imports which have been actually purchased, on entry of the same, to make such addition in the entry to the cost or value given in the invoice, as in his opinion may raise the same to the true market value of such imports in the principal markets of the country whence the importation shall have been made, or in which the goods imported shall have been originally manufactured or produced, as the case may be; and to add thereto all costs and charges which, under existing laws, would form part of the true value at the port where the same may be entered, upon which the duties shall be assessed. And it shall be the duty of the collector, within whose district the same may be imported or entered to cause the dutiable value of such imports to be appraised, estimated and ascertained, in accordance with the provisions of existing laws; and if the appraised value thereof shall exceed by ten per centum or more the value so declared on the entry, then, in addition to the duties imposed by law on the same, there shall be levied, collected and paid, a duty of twenty per centum *ad valorem* on such appraised value: *Provided*, nevertheless, that under no circumstances shall the duty be assessed upon an amount less

than the invoice value, any law of Congress to the contrary notwithstanding." (9 Stats., 43).

The first section of the Act of March 3, 1851, C. 38, declares:

"That in all cases where there is or shall be imposed any *ad valorem* rate of duty on any goods, wares or merchandise imported into the United States, it shall be the duty of the collector within whose district the same shall be imported or entered to cause the actual market value or *wholesale price* thereof, *at the period of the exportation* to the United States, in the principal markets of the country *from which the same shall have been imported* into the United States, to be appraised, estimated and ascertained, and to such value or price shall be added *all* costs and charges, *except insurance*, and including in every case a charge for commissions, at the usual rates, as the true value at the port where the same may be entered, upon which duties shall be assessed" (9 Stats., 629, 630).

In this statute Congress first uses the term "*wholesale price*" as synonymous with "*market value*," and substitutes the time and place of *exportation* for time of *purchase* and place of *production* in ascertaining value.

Unambiguous as the terms of this provision are, the importers were obliged to go to the Supreme Court of the United States to have it judicially determined that Congress meant precisely what it said, the Circuit Court having divided upon this question. The Supreme Court, through its Chief Justice, in Stairs vs. Peaslee, 18 How., 521, 525, said:

"The time and the place to which the appraisers are required to look, when making their appraisement, are both distinctly specified in the law—the time being the period of exportation, and the place the country from which they are imported into the United States. It makes no reference to their value in the country of production, or the time of purchase. And as there is no ambiguity in the language of the act, and it em-

braces all goods subject to an *ad valorem* duty, the Court would hardly be justified in giving a construction to it narrower than its words fairly import.

"It is true, as urged by the counsel for the plaintiff that in the previous laws upon the same subject, the country of production or manufacture was the place to which the appraisers were referred in order to ascertain their value. And undoubtedly the previous acts of Congress, and the policy which they indicate, are proper to be considered in interpreting the Act of 1851, and might influence its construction, if its language was found to be ambiguous. But that is not the case in the present instance.

"The law taken by itself will admit of but one construction and that is, the appraisement must be made, by the value of the goods in the principal markets of the country from which they are exported, at the time of such exportation to the United States. And, so far as these provisions are inconsistent with the provisions of previous laws, they show that Congress had changed its policy in this respect and intended to repeal the laws by which it had been established."

We submit this language is equally applicable to the provisions of the Act of 1883 under consideration.

See also Sampson vs. Peaslee, 20 How., 578.

The Act of March 2, 1861, chapter 68, provides in its 28th section that the foreign market value shall be taken as of the *day of shipment* whenever that is indicated by bills of lading presented (12 Stats., 197).

This defines date of exportation, as that of loading, not of sailing; so that different packages of the same article, laden on different days, on board the same ship, may have different values assigned them, and pay unequal duties, though reaching *this* market upon the same day.

Its 32d section declares:

"That when merchandise of the same material or description, but of different values, are invoiced at an average price, and not otherwise provided for, the duty shall be assessed upon the whole invoice at the rate

than the invoice value, any law of Congress to the contrary notwithstanding." (9 Stats., 43).

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Its 32d section declares:

"That when merchandise of the same material or description, but of different values, are invoiced at an average price, and not otherwise provided for, the duty shall be assessed upon the whole invoice at the rate

the highest valued goods in such invoice are subject to under this act. The words *value* and *valued*, used in this act, shall be construed and understood as meaning the true market value of the goods, wares and merchandise in the principal markets of the country from whence exported at the date of exportation" (12 Stats., 197).

Again discriminating between dutiable and market value.

ACT OF JUNE 30, 1864.

SEC. 23. That it shall be lawful for the owner, consignee or agent of any goods, wares or merchandise which shall have been actually purchased or procured otherwise than by purchase, at the time when he shall produce his original invoice, or invoices, to the collector, and make and verify his written entry of his goods, wares and merchandise, and not afterwards, to make such addition in the entry to the cost or value given in the invoice as, in his opinion, may raise the same to the *market value* of such goods, wares and merchandise *in the principal markets* of the country whence they shall have been imported, and to add thereto all costs and charges, which under existing laws, would form part of the *true value at the port where the same may be entered, upon which the duties should be assessed.* And it shall be the duty of the collector, within whose district the same may be imported or entered to cause the *dutiable* value of such goods, wares and merchandise, to be appraised, estimated and ascertained in accordance with the provisions of existing laws. And if the appraised value thereof shall exceed by ten per centum or more the value so declared on the entry, then in addition to the duties imposed by law on the same, there shall be levied, collected and paid a duty of twenty per centum *ad valorem* on the appraised value. Provided, that the duty shall not be assessed upon an amount less than the invoice or entered value, any law of Congress to the contrary notwithstanding."

13 Stats., 216, 217.

The distinction between market and dutiable value is here again recognized.

The next section (24) provides for the ascertainment of dutiable value by adding to value in principal markets of place of growth, etc., all subsequent expenses or charges.

This section is as follows:

"SEC. 24. And be it, etc., that in determining the valuation of goods imported into the United States from foreign countries, except as *hereinbefore* provided, upon which duties imposed by any existing laws are to be assessed, the actual value of such goods on shipboard at the last place of shipment to the United States shall be deemed the dutiable value. And such value shall be ascertained by *adding* to the value of such goods at the place of growth, production or manufacture, the cost of transportation, shipment and transshipment, with all the expenses included, from the place of growth, production or manufacture, whether by land or water, to the vessel in which shipment is made to the United States, *the value of the sack, box or covering of any* KIND, *in which such goods are contained*, commission at the usual rate, in no case less than two and one-half per centum brokerage, and all export duties, together with all costs and charges, paid or incurred for placing said goods on shipboard, and all other proper charges specified by law" (13 Stats., 217).

The 7th section of the Act of March 3d, 1865, *abolished* the practice of including certain charges as part of dutiable value, as established by previous legislation, and declared:

"That in all cases where there is or shall be imposed any *ad valorem* rate of duty on any goods, wares or merchandise imported into the United States, and in all cases where the duty imposed by law shall be regulated by, or directed to be estimated or based upon, the value of the square yard, or of any specified quantity or parcel of such goods, wares or merchandise, it shall be the duty of the collector * * * to cause the *actual market value*, or *wholesale price* thereof, at the period of the exportation to the United States, to be appraised, and such appraised value shall be con-

sidered the value upon which duty shall be assessed" (13 Stats., 493–4).

The importer at time of entry is allowed "to make such addition in the entry to the cost or value given in the invoice as in his opinion may raise the same to *the actual market value or wholesale price* of such goods, &c."

Then, after providing for additional duty in case the appraised value exceeds by ten per cent. the entered value, it repeals sections 23 and 24 of the Act of 1864 (*vide supra*) and then proceeds:

"*And all acts and parts of acts requiring duties to be assessed upon commissions, brokerage, cost of transportation, shipment, transshipment and other like costs and charges incurred in placing any goods, wares and merchandise on shipboard, and all acts and parts of acts inconsistent with the provisions of this act, are hereby repealed.*"

13 Stats., 493–494.

The addition of these charges was again required by the Act of March 28, 1866, C. 298, Sect. 9 (14 Stat., 330), which is the basis of the repealed sections of the Revised Statutes 2907 and 2908 cited *ante*, page 6.

The Act of March 3d, 1873, Chap. 232, Sec. 4, declares that gloves protected by trade-marks shall not be appraised at any higher or lower market value than other gloves, manufactures of the same country, which are not a subject of trade-mark whatever the price may be at which such trade-marked gloves are sold (17 Stats., 559).

Many other instances of an entirely arbitrary value being assigned to selected commodities might be cited. We will only add a clause extracted from the Act of April 27, 1792, Chap. 27, Sec. 3, relating to salt, which enacts in substance that a bushel of salt which weighs less than fifty-six pounds shall be deemed to have that weight; if it is heavier its actual weight is taken. A

similar provision is found in later enactments. It is as follows:

"That from and after the last day of July next in computing the duty *heretofore* laid upon salt, a bushel of salt shall be deemed not to *exceed* the weight of 56 pounds avoirdupois; and as often as the actual bushel of salt shall *exceed* the said weight, said salt shall be charged in the proportion of the present rate of duty per bushel for every 56 pounds of its actual weight" (1 Stats., 260).

Though the acts of 1789 and subsequent legislation, prior to March 1st, 1823, required certain oaths to be taken by persons entering importations, the statute of the last-named date was the first to set out the precise form of oath *in hæc verba*. Its fourth section declares that such one of the forms of oath there given shall be taken as the circumstances require. The first form is that to be administered to the consignee, importer or agent, presenting the invoice. Its conclusion is—"that the invoice now produced by me exhibits the actual cost (if purchased) or fair market value (if otherwise obtained) at the time or times, and place or places, when or where procured (as the case may be) of the said goods, wares and merchandise, all the charges thereon, and no other or different discount, bounty, or drawback, but such as has been actually allowed on the same" (3 Stats., 731). The oath prescribed to be administered to the owner of *purchased* goods was this:

"I, , do solemnly and truly (swear or affirm) that the entry now delivered by me to the Collector of , contains a just and true account of all the goods, wares and merchandise, imported by or consigned to me, in the , whereof is master, from ; that the invoice which I now produce contains a just and faithful account of the actual cost of the said goods, wares and merchandise, of all charges thereon including charges of purchasing, carriage, bleaching, dyeing,

dressing, finishing, putting up and packing, and no other discount, drawback, or bounty, but such as has been actually allowed on the same; that I do not know or believe in the existence of any invoice or bill of lading other than those now produced by me, and that they are in the state in which I actually received them. And I do further solemnly and truly (swear or affirm) that I have not, in the said entry or invoice, concealed or suppressed anything whereby the United States Government may be defrauded of any part of the duty lawfully due on the said goods, wares and merchandise; and that if, at any time hereafter, I discover any error in the said invoice, or in the account now produced, of the said goods, wares and merchandise, or receive any other invoice of the same, I will immediately make the same known to the Collector of this district" (*Ib.*).

Where the goods were not actually purchased, the manufacturer or owner was required to swear "that the said goods, wares and merchandise were not actually bought by me or by my agent, in the ordinary mode of bargain and sale, but that nevertheless the invoice which I now produce contains a just and faithful valuation of the same, at their fair market value, *including charges of purchasing, carriage, bleaching, dyeing, dressing, finishing, putting up and packing*, at the time or times, and place or places when and where procured for my account (or for account of myself and partners): that the said invoice contains also a just and faithful account of all charges actually paid; and no other discount, drawback, or bounty, but such as has been actually allowed on the said goods, wares and merchandise" (*Ib.*, 732).

The oaths, as formulated in this Act of 1823, remained unchanged for sixty years, and until the changes in the dutiable value of goods made by the Act of March 3d, 1883, required a corresponding modification.

This last-named act prescribes the oath to be taken by the consignee, importer, or agent, when entry is

made by him, concluding with this statement: "That the invoice now produced by me exhibits the actual cost (if purchased) or fair market value (if otherwise obtained) at the time or times and place or places when or where procured (as the case may be) of the said goods, wares or merchandise, including all the costs for finishing said goods, wares, and merchandise to their present condition and no other or different discount, bounty, or drawback, but such as has been actually allowed on the same" (22 Stats., 524).

The first sentence of the oath to be taken by the owner when he enters the goods, containing all that is pertinent to the subject under consideration, is as follows:

I —— ——— do solemnly and truly swear (or affirm) that the entry now delivered by me to the collector of contains a just and true account of the goods, wares, and merchandise imported by or consigned to me, in the whereof is master; that the invoice which I now produce contains a just and faithful account of the actual cost of the said goods, wares and merchandise, including all cost of finishing said goods, wares, and merchandise, to their present condition, and no other discount, drawback, or bounty, but such as has been actually allowed on the same; that I do not know or believe in the existence of any invoice or bill of lading other than those now produced by me, and that they are in the state in which I actually received them. *Ib.*

In the oath to be taken by the manufacturer, entering goods not purchased, the following clause is substituted for that found in the corresponding oath under the Act of 1823: "That the said invoice contains a just and faithful account of all the cost for *finishing said goods, wares and merchandise* to their present condition and no other discount, drawback, or bounty but such as has been actually allowed on the said goods, wares and merchandise" (*Ib.*, 525).

In this connection we quote from the report of General Appraisers Ketchum and Rice and Deputy Collector Fiske to the Secretary, dated August 6, 1883:

"The distinction between expenses which are incurred in the finishing of goods or the bringing of the fabric or other article purchased into the state required by the vendee, as, for example, the bleaching of cotton embroideries and the finishing expenses connected with the stiffening or ironing of the same, on the one hand, and the charges incidental to cartons, boxing, &c., on the other, is well understood by every merchant at all familiar with the importing business, and by every Government officer at all familiar with the practice of importers and the appraisement of imported merchandise.

"Cloths, for example, of many descriptions must be 'calendered,' as it is called, before they have, upon the surface of the fabric, a certain appearance or style, which is part, as indicated, of the finishing. Kid gloves, as usually imported, must be provided with buttons. Braids and similar articles that are to be cut to lengths suitable for use of the vendee must be so cut to lengths before the article is considered finished for the purposes of the same. And so we might illustrate by many other references, but these are sufficient at once to suggest the difference between that which is known as a 'finishing expense,' described in the forms of oaths now in vogue, *and the expenses incidental to packing, boxing, &c., covered by the provisions of the former Tariff Act which are now repealed.*"

See report of commission appointed by the Secretary of the Treasury to consider questions under Section 7, Act of 1883, page 21.

We close with Section 3 of the Compromise Act of March, 1833, which never took effect because Congress eventually decided to adhere to the basis of foreign valuation.

Act of March 2, 1833:

"Sec. 3. And be it further enacted that, until the thirtieth day of June, one thousand eight hundred and forty-two, the duties imposed by existing laws, as

modified by this act, shall remain and continue to be collected. And from and after the day last aforesaid, all duties upon imports shall be collected in ready money, and all credits now allowed by law in the payment of duties shall be and hereby are abolished, and such duties shall be laid for the purpose of raising such revenue as may be necessary to an economical administration of the government; and from and after the day last aforesaid the duties required to be paid by law on goods, wares and merchandise shall be assessed upon the value thereof at the port where the same shall be entered, under such regulations as may be prescribed by law" (4 Stat., 630).

APPENDIX B.

DEPARTMENT DECISIONS.

Decisions of the Department and its uniform practice prior to March, 1883, show conclusively that the cost of *cartons* has uniformly been treated as a charge to be added to *market* value in order to ascertain *dutiable* value.

We refer to the following, showing an unbroken and uniform course of decision as to what were charges from 1846 to 1883.

The Treasury circular of November 25, 1846, contained instructions relative to the Tariff Act of that year. The material portions of it are embodied in the opinion of this Court in Knight vs. Schell 24 Howard, 531, as follows:

"Confirmation of these views, if any be needed, may be found in the almost unbroken practice of the Treasury Department. Take, for example, the Treasury circular of the twenty-sixth of November, 1846, and it will be found that it fully justifies the conclusion to which we have come.

"By that circular the several collectors were informed that "The principle upon which the appraisement is based is this: That the actual value of articles on shipboard at the last place of shipment to the United States, including all preceding expenses, duties, costs, charges and transportation, is the foreign value upon which the duty is to be assessed. The costs and charges that are to be embraced in fixing the valuation, over and above the value of the article at the place of growth, production or manufacture, are:

"The transportation, shipment and transshipment, with all the expenses included, from the place of growth, production or manufacture, whether by land or water carriage, to the vessel in which shipment is

made to the United States. Included in these estimates is the value of the sack, *package, box, crate, hogshead*, barrel, bale, cask, can, and covering of all kinds; bottles, jars, vessels and demijohns" (Mayo Comp., 350, 351).

"Casks, including barrels, as well as hogsheads, exported from the United States empty, and returned filled, have almost invariably, since the passage of the Tariff Act of the 20th of July, 1846, been included among the dutiable charges, although of American manufacture, on the ground that, when so filled and brought back, they were not in the same condition as when exported, within the meaning of the provision of that act (Mayo Comp., 407). That construction has been affirmed by the Treasury Department, since the passage of the Appraisement Act of the 3d of March, 1851, as will appear by reference to the Treasury circular adopted shortly after its passage. By that circular the Department declares that:

"The law enjoins that there shall be added 'all costs and charges, except insurance, and including, in every case, a charge for commissions at the usual rates.' These charges are as follows, to wit:

"They must include 'purchasing, carriages, dyeing, bleaching, dressing, finishing, putting up and packing,' *together with the value of the sack, package, box, crate, hogshead, barrel, bale, cask, can, and covering of all kinds, bottles, jars, vessels and demijohns.*"

TREASURY REGULATIONS, 1857.

(Section XV.)

Dutiable Value of Imports.

Art. 298. The Act of March 3d, 1851, entitled "An act to amend the acts regulating the appraisement of imported merchandise and for other purposes," provides in its first section: "That in all cases where there is or shall be imposed any *ad valorem* rate of duty on any goods, wares or merchandise imported in to the United

States, it shall be the duty of the collector within whose district the same shall be imported or entered to cause the actual market value or wholesale price thereof at the period of the exportation to the United States to be appraised, estimated and ascertained, *and to such value or price shall be* ADDED *all costs and charges*, except insurance, and including in every case a charge for commissions at the usual rates, as the true value at the ports where the same may be entered, upon which duties shall be assessed."

299. The value upon which duties are to be assessed is thus established to be :

FIRST. The actual market value or wholesale price of the merchandise in the principal markets of the country from which it was imported into the United States at the date of exportation to be ascertained by appraisement.

SECOND. All costs and charges, except insurance, and including in every case a charge for commissions at the usual rates, to be ascertained and added to the value found by appraisement, by the collector and naval officer, or the collector alone at ports where there is no naval officer.

(Further on.)

306. These charges are :

FIRST. *The expenses of putting up and packing together with the value of the sack, package, box, crate, hogshead, barrel, bale, cask, can, bottles, jars, vessels and demijohns, and covering of all kinds.*

SECOND. Commissions must in every case be made a dutiable charge at the usual rates, but never less than $2\frac{1}{2}$ per cent., without the special sanction of the Department, nor less than is stated in the invoice. If it appear on the face of the invoice or entry at less than the usual rate, it must be advanced to that rate for the ascertainment of dutiable value. Where there is a distinct brokerage, or where brokerage is a usual charge at the place of shipment or purchase, that is to be added likewise. Commissions on the amount of shipping charges at the foreign port of exportation constitute one of the charges liable to duty under existing laws and instructions.

THIRD. Export duty, as on silks from China, storage at the foreign shipping ports, cost of putting cargoes on board ship, including drayage, labor, bill of lading, lighterage, town dues and shipping charges, deck or

wharf dues, and all charges to place the articles on ship board, and fire insurance, if effected for a period prior to the shipment of goods to the United States.

Marine insurance is not to be treated as a dutiable charge."

TREASURY REGULATIONS, 1874.

Dutiable Value of Imports.

Art. 437. The *dutiable* value of merchandise imported in packages, as a general rule, embraces the cost of the cask, box, bag, bottle or other envelope or covering, when so purchased; but when such is not the case, and the envelope or covering has been purchased or furnished separate from the contents, the cost of such envelope or covering must be *added* to the value of the contents.

The latter provision is inapplicable to merchandise paying purely a specific duty, if the envelope or covering is such as is usually employed to contain the goods in question.

In cases where the envelope, whether containing dutiable or free articles, shall be of a character or description not ordinarily used in commerce in the conveyance of similar articles, the facts are to be reported to the Secretary of the Treasury for consideration. When the importation is of free goods, and no such question is presented, the envelope will be, equally with its contents, entitled to free entry.

SYNOPSIS OF DECISIONS, No. 2,620.

Cost of Cartons.

Treasury Department, January 22, 1876.

Sir—Your letter of the 19th instant is received, reporting on the communication of G. Cramer, dated the 18th ultimo, in which he complains of the action of

the appraiser at your port in adding to his invoice of certain goods imported per "Hermann," November 30, 1875, a sum for the cost of cartons, which the importer claims was already included in the invoice.

It appears, from the special report of the appraiser, that upon re-examination he finds his original return of value to be correct, as the cost of the cartons was not included in the invoice value. In this correction, however, the department would state for the information of the appraiser that, in its opinion, cartons and other outside coverings of merchandise, which are bought and sold with the goods they contain, are not subject to a separate rate of duty, but are dutiable at the same rate as the goods *under the provisions of section 2,907 of the Revised Statutes*), unless they are unusual in character and possess an extraordinary or exclusive value.

Respectfully,
By order: C. F. BURNHAM,
Assistant Secretary.

Collector of Customs, New York.

SYNOPSIS OF DECISIONS, No. 2975, Sept. 19, 1876

(EXTRACTS.)

It having been suggested by the appraiser that shippers be required to state separately upon their invoices the following items, viz.:

"1. The market value of the merchandise.

"2. The cost of transportation to port of shipment and of shipment.

"3. The amount of packing charges; and

"4. Comissions, etc."

The Department says in a letter to the Secretary of State:

"It is evident to this Department, upon due consideration of the matter, that the specification of such costs and charges in the invoice is absolutely necessary to enable the appraising officer of the customs to properly carry out the law above referred to, and to protect the interests of the Government.

"It is therefore respectfully requested that the suggestion of the appraiser be carried into effect, and that the consular officers at the ports mentioned, to which may be added Dunfermline, be instructed accordingly."

In the following *cartons* are specifically recognized as a "charge."

SYNOPSIS OF DECISIONS No. 3550.

Dutiable Charges and Commissions.

Treasury Department,
April 25, 1878.

Sir—The Department is in receipt of your letter, dated the 13th instant, reporting on the appeal (7570*e*) of J. Lee Smith & Co. from your decision assessing regular and additional duties on shipping charges added by the appraiser to the invoice value of certain merchandise imported per "Lepanto," February 26, 1878.

It appears from the report of the appraiser, transmitted with your letter, that the charges added are the customary shipping charges at the place of shipment for conveying goods from the manufactory to the vessel; and that the addition of the charges was made for the reason that they were not specified in the invoice, and that the invoice did not state that the goods were "free on board."

The appellants allege that the invoice price included the cartons; and claim that, inasmuch as the merchandise was not transported from an interior port, the charges were not dutiable.

You are informed that, under section 2907 of the Revised Statutes, such charges constitute an element of dutiable value, and that unless they are specified in the invoice, or it is explicitly stated therein that the goods were purchased "free on board," or that the price or value specified included the charges, it becomes the duty of the appraiser to add them and to assess thereon the regular duties, and 100 per cent. additional, under section 14 of the Act of June 22, 1874.

The appraiser is not authorized, under the instructions of the Department, to accept any other evidence

than that above mentioned, that charges are included in the value expressed in the invoice.

In this connection reference is made to the Department's letter of the 13th of July last (Synopsis 3298), substantially in accordance with this decision.

Very respectfully,
By order,
H. F. FRENCH,
Assistant Secretary.

Collector of Customs, New York.

SYNOPSIS OF DECISIONS.

No. 3735.

TREASURY DEPARTMENT, Oct. 4, '78.

SIR—The Department duly received your letter of the 20th ultimo, in which you call attention to its decision of April 25, '78 (Synopsis 3550), in relation to additions for charges on invoice, when such charges are not specified therein.

You state that it has heretofore been the custom to regard as included in the invoice value charges for cartons and packing of various descriptions of merchandise, such as leather gloves, German hosiery and toys, and that the Collector recently returned to you a number of invoices of German hosiery because charges for cases and packing were not specified in such invoices, either as separate items or as being included in the invoice value, and for which no addition was made by you. In reply to your request for instructions, I have to state that the principle laid down in decision No. 3550 is that when charges are not separately specified in the invoice, and the goods are not therein described as being free of charges, it is the duty of Customs officers to add such charges for the purpose of assessment of duty.

The reason of the rule was that the insertion in the invoice of separate items, or declaration therein that the goods were free of charges, would make the mat-

ter free of doubt, and compel a practice which would be an aid in securing uniformity at the various ports.

In view of the statement, however, made by you, that the charges for packing, and *cartons* are always merged in the invoice price description of the classes of goods before named, I have to state that the Department does not desire to adopt summarily a practice contrary thereto, without giving parties concerned a notice thereof. You will therefore continue to accept invoices as correct where you shall be satisfied that the price paid includes charges *for packing and cartons* until January 1, '79, and on and after that date it will be required that invoices shall separately specify such charges, or declare that the price includes *such charges*, otherwise *additions* for *such charges* shall be made.

A copy hereof will be furnished to the Collector.

Very Respectfully,

H. F. FRENCH,
Assistant Secretary.

To th U. S. Appraiser,
N. Y.

In No. 3861—Jany. 25, 1879—referring to No. 3735 and to complaints of want of notice, Department says:

"The Department has, therefore, to state that a strict enforcement of the rule will be suspended until the 1st of April next, and in the meantime the appraiser will exercise his own judgment in regard to the addition to be made for charges *for cartons*, packing, &c., on the description of goods referred to in decision No. 3735.

In order that no excuse may remain for the failure to comply with the requirements of the circular when put in full force, I will thank you to give as public information to the importers at your port of the rule mentioned, and of the time when it takes effect, as may be practicable.

The Secretary of State will also be requested to instruct consular officers to notify shippers of goods of the rule and the time of its enforcement, so that, as far as possible, invoices shall be made to conform thereto."

In No. 4096—July 16, 1879—the Department held, in respect to castile soap, on a question as to whether the invoice covered cost of packages:

"It further appears, however, that the goods are of that class and character which are always sold at prices covering the cost of packages, &c., or at so much per box, and that the Appraiser is of opinion that in this case the invoice price covers all the charges incurred up to the time of placing the goods on shipboard. Such being the case, the Department directs that the entry of the soap be liquidated without the addition of the said charges."

To this may be added an extract from a circular of the late Secretary Folger, found in No. 5922, Synopsis of Decisions, dated September 27, 1883:

"The part of that section with which we are now most particularly concerned is that which adds to the foreign market value of the imported merchandise to form the basis for a dutiable estimate and appraisal thereof, 'the value of the sack, box or covering of any kind in which such merchandise is contained.' Such was the language of the section in this particular. The *practice* of the administrative officers of the Government under this clause was to add to the foreign market value of the merchandise the cost, *not alone of the final or outside sack, box, or covering into which the merchandise was put for safety or convenience of ocean carriage from the country of purchase to the United States, but the cost of the covering,* CARTON, *or other device in which the merchandise was offered for sale in the wholesale foreign market.* In Synopsis of Decisions of the Treasury Department, No. 2620, of date January 22, 1876, it appears that the Collector of Customs at the Port of New York was instructed that the action of the appraiser was approved, whereby to the invoice of goods, in which it did not appear that the cost of the cartons was included, he added the value of the cartons—cartons being an inside or preparative covering for certain goods. In that decision it is held that cartons and other inside coverings of goods are dutiable at the same rate as that of the goods which they enclose. It is further stated that this is so under the

provisions of section 2907 of the Revised Statutes, cited above. And this ruling is recognized in a decision subsequent to that above cited (see Synopsis of Decisions No. 3735, of date of October 4, 1878). These instructions have been followed from the date of the first of them down to the passage of the new Tariff Act of 1883 (chapter 121, Laws of 1883).

APPENDIX C.

OPINIONS.

At the close of the testimony in this case the defendant's counsel moved the Court to direct a verdict for the defendant (Record, fol. 53). When the Court came in the next morning, the Judge said:

THE COURT: I have concluded to direct a verdict for the defendant in this case. I have given the questions involved considerable consideration since the recess, and I have arrived at these conclusions:

Sec. 7 of the Act of March 3, 1883, not only repeals Secs. 2907 and 2908 of the Revised Statutes, but also declares affirmatively that the value of the usual and necessary sacks, crates, boxes or coverings of any kind shall not be estimated as part of the value of the goods imported. Were it not for this affirmative declaration, the only rule of estimating the dutiable value of the goods would be that prescribed by Secs. 2905 and 2906 of the Revised Statutes, and Sec. 9 of the Act of March 3, 1883. As it is, however, the current market value or wholesale price of the goods themselves excluding the value of the usual and necessary boxes, coverings, and so forth, is the rule which obtains.

Now, there are, doubtless, articles bought and sold in the foreign market and imported, as to which the boxes and coverings are so indispensable that ordinarily and practically they are not, and cannot, be bought and sold without them, and as to which, therefore, the boxes and coverings are not a distinct element of price or market value, according to the usage of trade, but are merged in and treated as part of the price of the articles themselves. Matches, and perhaps cigars, are examples in point. The price or market value of such articles separate from the coverings, boxes, etc., cannot well be ascertained, because they are not commercially known. As to such goods, there-

fore, the price or market value of the articles with the boxes and coverings is the price or market value of the goods themselves.

This, in my view, is precisely what is meant to be the rule for estimating the dutiable value prescribed by Sec. 9 of the Act of March 3, 1883. The usual and necessary boxes and coverings are not to be estimated as part of the value of the goods, because, according to the usage of trade, they are not estimated by those who deal in them, and market value or price is the price or value of the article in the condition in which it is usually and necessarily bought and sold.

Where the boxes or coverings are not usually treated as a part of the goods themselves, and are not regarded as practically essential to commercial dealing in the particular goods, the boxes, coverings, &c., should be classified and assessed according to their dutiable character. Their value cannot be added to the price or market valae of the goods; but duty is to be collected upon them according to their proper classification.

This construction is not inconsistent with the form of oath prescribed by the Act of 1883. Any different conclusion would require it to be assumed that Congress intended to incorporate into the law a rule for ascertaining price or market value which is unknown to the commercial world. The meaning of the legislation was to change the process of ascertaining the duty on boxes or coverings as part of the price or market value of the goods, and instead, to require boxes and coverings to be classified according to their dutiable character, when they are not usually and necessarily inseparable from the goods themselves, and their cost value inseparable from that of the goods. The importer is not to pay duty on them twice. When he has paid for them as part of the price of the goods, he is not to pay again a duty upon them as boxes, coverings, &c.

Now, applying these legal conclusions to the evidence in this case, it seems to me there is no fair question for the jury; because the hosiery which was imported here is not an article which, according to the usage of the trade, or from its inherent characteristics, is inseparable from the cartons in which it was imported. Those cartons or boxes are preferred by a limited class of purchasers for their own convenience, more especially, I think (according to the evidence,

almost exclusively), by American purchasers. The articles of hosiery can be bought and sold without them; but they are kept better; they are more easily counted; it is a more convenient form in which to deal with them when they are enclosed in the cartons.

I do not think there is any real dispute or disputable inferences upon the evidence as to these facts.

Duty was, therefore, collectible on them as paper boxes, and, as the protest is not placed on the ground of an improper classification, I think the defendant is entitled to a verdict.

The plaintiffs thereupon moved for a new trial, and subsequently the following opinion on that motion was promulgated:

WALLACE, J.: The plaintiffs sue for duties which they claim were illegally exacted by the defendant, as Collector of the port of New York, upon their importation in July, 1883, of certain gloves and hosiery. The merchandise was purchased by plaintiff in Chemnitz, Germany, and *at the time of the purchase was in cartons*. According to the custom of trade there, gloves and hosiery, when intended for the markets of the United States, are usually prepared *for sale* by the manufacturers *in cartons*, not for the purpose of transportation, but because purchasers for our markets prefer them put up in that form; and the manufacturers there ordinarily include the price of the cartons in the price of the gloves and hosiery. For the purposes of shipment and transportation outside cases inclosing the cartons are used. The cartons are preferred because the goods are more conveniently kept and handled by retailers in that form than when loose. In estimating the dutiable value of the gloves and hosiery, the appraiser added to the price appearing in the plaintiff's invoices as the cost price of the gloves and hosiery, a sum sufficient to cover the cost or value of the cartons also; that item having apparently been omitted in the invoices, and not included in the cost price of the gloves and hosiery, presumably in order to present the main question which has been discussed in this case. That question relates to the construction to be placed upon section 7 of the Act of Congress of March 3, 1883, under which the plaintiffs contend that the value of the cartons should be excluded by the appraiser in ascertaining the dutiable value of the goods.

A verdict was ordered for the defendant upon the trial, *on the ground* that the plaintiffs' protest *was insufficient to present the objections relied upon by them* to the exaction of the duties in controversy. It is not necessary, for the decision of this motion for a new trial, to consider the question of the sufficiency of the protest, because the conclusion is reached that the plaintiffs' contention upon the main question is not tenable, and that the verdict should stand, because the duties were not illegally exacted.

The meaning and effect of section 7 of the act of March 3, 1883, were carefully considered by the Attorney-General of the United States in his opinion of the date of January 11, 1884. One of the questions presented for his judgment was whether the section prohibits the inclusion in the dutiable value of merchandise of the value of the boxes and coverings which are part of its preparation for sale *in the markets* of the country of exportation. After a full review of the pre-existing legislation, he answered this question in the negative. His opinion is so satisfactory that it is adopted for present purposes with a single qualification. He states incidentally that the cost of boxes or coverings with which goods are *ordinarily* prepared for sale in the foreign market, and in which they are *usually* sold and purchased there, must be regarded as entering to or as being an element of the actual market value of the goods. If it is intended by this to indicate that the cost of the boxes or coverings should not be included unless the goods are ordinarily and usually prepared and sold in the foreign market in such boxes or coverings, that suggestion is not assented to. It seems to be founded upon the language of Clifford, J., in Cobb vs. Hamlin, 3 Cliff., 191, 200, in which case it was said by that learned Judge:

"But no doubt is entertained that the words 'actual market value,' without more, would include the cost of the box, package or covering in all cases where the merchandise in question was actually purchased in the box, package or covering, and is usually so purchased and sold for shipment in the foreign market, and where the price includes the box, package or covering, as well as the goods therein contained."

The precise question upon which this part of the opinion was expressed was not involved in that case, and there is no reason to suppose that it was intended

to decide that the cost of the box, package or covering should not be considered as entering into the actual market value of the goods, when they are treated as part of the goods, and when the goods are actually purchased in the box, package or covering and the price includes the box, package or covering as well as the goods contained therein. When section 7 declares that none of the charges imposed by existing law, nor the value of the usual and necessary sacks, etc., shall be estimated in ascertaining the value of the goods in order to determine their dutiable value, the language refers to the actual or usual charges for putting up, preparing and packing the goods for transportation and shipment, including the sacks, boxes or covering of any kind in which they are contained, which, by the provisions of section 2907 Revised Statutes, are to be added to the wholesale price or market value of the goods at the time of the exportation in the principal markets of the country of exportation. Although upon first consideration it would seem that this part of the section was unnecessary, if something more than the repeal of section 2907 was not intended by Congress, the clause, when read with the proviso annexed to it, appears to have been added to the repealing clause in order to emphasize the intent of Congress, and at the same time to denote explicitly that covering, &c., although employed ostensibly for the purpose of transportation and shipment, should not escape duty if used with the design to evade duty, or for any purpose other than the *bona fide* preparation of the goods for transportation. Section 7 is therefore to be construed as merely repealing pre-existing laws so far as they relate to adding the cost and expenses of transportation, shipment and transshipment, including those of preparing and packing the goods, to the wholesale price or actual market value in the principal markets of the country of exportation in order to ascertain dutiable value. Its effect is to abrogate section 9 of the Act of March 28, 1866 (section 2907), *and restore* the provisions of section 7 of the Act of March 3, 1865. While it abrogates the existing provisions for determining dutiable value, it does not contemplate prescribing any new rule for ascertaining market value. This is to be ascertained by ascertaining the actual value or wholesale price of *the goods* in the condition in which they are purchased and sold in the foreign market, without reference to

special preparation for transportation and shipment. The "usual and necessary sacks, crates, boxes and coverings" which are not to be estimated as part of the value of the goods in determining their dutiable value, are not those which are employed in the preparation of the goods for sale *in the markets of the country* of exportation, but are those which are usually and necessarily employed in preparing and packing them for transportation and shipment. Whenever, therefore, goods are sold in the markets of the country of exportation, whether usually or only occasionally, in boxes, cartons, or coverings of any kind, which make the goods attractive and desirable, and the boxes, cartons, etc., enter into the price there of the goods as merchantable commodities, the boxes, cartons, etc., are accessories of the goods, and actual market value includes them as an element of the value of the goods in the condition in which they are purchased.

In this case the appraiser properly added to the plaintiffs' invoice price of the hosiery and stockings a sufficient sum to include the value of the cartons, the cost or value of which was not apparently included in the invoice price of the goods. He did this in order to determine the market value of the goods *in the condition in which they were offered for sale* in the principal markets of the country of exportation. If he erred in adding a *sum larger than was necessary to include the value of the cartons*, the plaintiffs should have applied for reappraisement. They cannot attack his decision collaterally upon the theory that the duties exacted were excessive.

The defendant was entitled to a verdict for these reasons, and the motion for a new trial is therefore denied.

This opinion is reported in 24 Fed. Rep., 852.

January 11, 1884, the then Attorney-General gave an opinion to the Secretary of the Treasury relative to the effect of the act of March 3, 1883.

Omitting synopsis of the statutes the opinion is as follows:

Section 7 of the last-mentioned act (*i. e.*, the act of 1883) repeals said section 2907, leaving in full force

section 2906. This is virtually a return to the basis prescribed by the act of 1865, before the modification thereof by the act of 1866, namely, the actual market value or wholesale price at the period of exportation, in the principal markets of the country from which the merchandise is imported (or in the principal markets of the country of production or manufacture, when the importation is from a country in which the merchandise has not been manufactured or produced. See section 2905, Revised Statutes), without any addition for costs or charges of any kind whatever. The above repeal, together with the repeal of section 2908, Revised Statutes, and section 14 of the act of June 22, 1874, also made by section 7 aforesaid, sweeps away all the provisions in force at the date of the act of 1883, which required or contemplated additions of that character to the market value or wholesale price of merchandise in determining its dutiable value. The clause in section 7, declaring that "hereafter none of the charges imposed by said sections, or any other provisions of existing law, shall be estimated in ascertaining the value of goods to be imported, nor shall the value of the usual and necessary sacks, crates, boxes or covering of any kind be estimated as part of their value in determining the amount of duties for which they are liable," adds nothing to and takes nothing from the force and effect of the repeal of the statutory provisions mentioned. It only emphasizes the intent of Congress in making the repeal, namely: That all charges theretofore required to be estimated as part of the dutiable value of merchandise should thereafter be excluded in ascertaining such value. It results from the foregoing that as regards the basis on which ad valorem duties are to be estimated, the only change effected by section 7 of the act of 1883 is to exclude from such basis all costs and charges which, under the law as it previously stood, were required to be added to the current or actual market value or wholesale price of the merchandise in the principal markets of the country whence the same was imported, or of the country of production or manufacture, as the case might be. Thus the current or actual value or wholesale price in those markets which is to be appraised is now made the sole basis for estimating such duties.

Recurring to the questions presented, I submit that

the answer to the first of these questions is sufficiently indicated by what has just been stated.

The second and third questions may be conveniently considered together. As already shown, the dutiable value of merchandise, since the modification of the Customs law made by the Act of 1883, is the current or actual market value or wholesale price thereof in the foreign market at the period of exportation, to be ascertained by appraisement (sections 2905 and 2906, Revised Statutes). What, then, is to be understood by current or actual market value or wholesale price as used in the statute? It is the amount of money or price which the article commands in the foreign market in the condition in which it is there customarily sold and purchased. As observed by the Court in Cobb vs. Hamlin (3 Cliff., 191), some descriptions of goods are purchased and sold in the foreign market in bulk, and are subsequently to the purchase and sale put into boxes, packages or coverings by the purchaser, for the preservation of the merchandise and the convenience of shipping. Other descriptions are put into boxes, packages or coverings by the producer, manufacturer or wholesale merchant. The actual market value in the former case does not include the cost of the box, package or covering within the meaning of that act of Congress (the Act of 1865, hereinbefore mentioned), as the boxes, packages or coverings in such cases are purchased by the shipper as the means of preserving the good and for the convenience of shipment. But no doubt is entertained that the words "actual market value," without more, would include the cost of the box, package or covering, in all cases where the merchandise in question was actually purchased in the box, package or covering, and is usually so purchased and sold for shipment in the foreign market, and where the price includes the box, package or covering as well as the goods therein contained.

In that case the court held that where oranges and lemons were in conformity to the general custom in the foreign market, purchased in bulk, and were afterward wrapped one by one in paper and packed in boxes and transported to the place of shipment, the expenses of the boxes, &c., and the labor of packing the fruit, did not constitute an element of its actual market value within the meaning of the act of 1865. And in a subsequent case (Harding vs. Whitney, 4 Cliff., 96) the

same court held that where wool was purchased and sold in the bale in the foreign market the words "actual market value" in the act of 1842 includes the cost of covering as well as the goods, as the whole are sold together without any additional charge for covering—that such expenses enters into and forms a constituent part of the market value and wholesale price of the merchandise at the place of exportation. In the first case, under the law as it existed before the passage of the act of 1883, the cost of the boxes, &c., and of the labor in packing the fruit, would be charges proper to be add to the market value of the fruit in ascertaining its dutiable value, while in the other case the addition of cost of the baling and covering to the actual market value of the wool would not be proper, as such cost enters into and is included in the actual market value of the article. According to the principle of these cases, which appears to me to be both sound and practicable, the cost of boxes or coverings, with which goods are ordinarily prepared for sale in the foreign markets, and in which they are usually sold and purchased there (the price paid for the goods including the box or covering, which goes therewith to the purhaser) must be regarded as entering into or as being an element of the actual market value of the goods.

Section 7 of the Act of 1883 does not forbid the inclusion in the dutiable value of merchandise of that which forms a constituent of its actual market value. Hence the dutiable value of goods usually prepared for sale as above, and thus usually sold in the foreign market, is their current or actual market value or wholesale price in such market as enhanced by the preparation thereof for sale in the manner referred to. In the language of your circular of September 27, 1883, "the dutiable value of the goods is the actual market value or wholesale price thereof in the condition of finish and preparation for sale in which they are finally offered by the foreign merchants to negotiating customers, and for which they will and do sell them, though that value or price be enhanced because of that finish and preparation, and though a part of the preparation consists in placing in or upon or about the goods, boxes, cartons, paper, cards or other like things."

In answer to the fourth question I submit that, with respect to boxes and coverings which are part of the preparation of goods for sale in the foreign market,

and are there sold with the goods as above stated, no distinction is admissible between those which do and those which do not go to the ultimate consumer. What becomes of the box or covering in the course of the trade, after the importation of the goods, is unimportant and in no way affects the question of dutiable value.

The remaining questions seem to be covered by the remarks already made in answer to the second and third questions. The expense of the usual and customary preparation of silks, velvets and ribbons for sale in the foreign market, to which the former questions refer, necessarily enters into the actual market value of those articles in that market. This being so, and the price paid for the goods in that market, including such expense, the latter is not to be estimated separately for "insertion in the dutiable value." Nor is any part thereof to be estimated and deducted from the dutiable value. The current or actual market value or wholesale price of the goods, in the condition in which they are usually sold and purchased in the foreign market, and that alone is required to be ascertained. Such value or price of the goods is now their dutiable value, and to add to or deduct from the latter costs or expenses of any kind which necessarily enter into and are included in the former, would be unwarranted by the existing law.

In July, 1883, the Secretary of the Treasury requested the opinion of a commission of Customs officers. Following is the report of a portion of that commission:

PORT OF NEW YORK,

Appraiser's Office, August 6, 1883.

SIR: By Department letter of July 19, 1883, directed to the Collector of Customs at New York, it was stated that a large number of appeals had been made to the Department from the assessment of duty on imported merchandise where the values reported by the appraiser included certain items which the importer claimed to be exempt from duty as charges under section 7 of the Act of March 3, 1883. The action of customs officers

in this respect, it was stated, had been based upon the circular of May 15, 1883, embraced in Department's decision No. 5706. By an examination of these appeals the Department states it does not appear that the principle embodied in the circular has been applied equally at all the ports, and in some instances it has been apprehended that customs officers have gone beyond the principle embodied in the circular and added charges which were clearly exempt from duty under the law.

The Department, wishing to avoid disputes as far as possible under the tariff act above referred to, expressed in said letter the desire that a conference with the leading customs officers connected with the appraiser's department and some others shoud be held to consider the practical application of section 7 of the Tariff Act of March 3, 1883, and the assessment of duty on imported goods, and to consider also what are the necessary sacks, crates, boxes, and covering intended not to be estimated as part of their value in determining the amount of duty to which they are liable. The Department also expressed a desire that the officers who might participate in said conference should consider the whole subject and with the same freedom as if the circular mentioned had not been issued.

The undersigned, in company with Mr. James, of the customs division of the Treasury Department, Mr. Goldsborough, of the appraiser's office at Baltimore, and Mr. Treloar, of the Collector's office at New York, have carefully considered the points referred to them for consideration by the said Department letter. At first it was believed that a single report might be framed which would set forth sufficiently for the use of the Department the two opposite views entertained by the members of the Commission, constituted as described by the Department. Subsequent consideration induced the Commission to believe that the wiser plan would be the submission of two separate reports, each of which should fully set forth, by separate statement, the views of its supporters. Should the Department, without further reference of the question at issue, then pass upon the subject of this discussion, each division of the Commission would feel that full benefit would have been derived from the views entertained by means of a completeness of state-

ment, and in the event of a request for an authoritative construction of the law on the part of the Attorney-General, there would be an additional advantage in the plan finally adopted for the expression of our respective views.

In order to avoid the giving of unnecessary length to this report, the undersigned respectfully refer to a copy herewith of a letter of the appraiser at the port of New York, to the Collector of Customs at this port, under date of April 11, 1883, desiring as they do, to make the said letter of the New York appraiser, as far as it goes, an embodiment of their views and a portion of this report in connection with the question submitted.

In addition to the views presented in that letter, we respectfully submit the following suggestions:

It is undoubtedly the duty of administrative officers, so far as they may be able so to do, to correctly interpret and enforce the law under which they are called upon to act. If they can accomplish this, and at the same time so define their proposed line of action as to secure uniformity of practice among the subordinates upon whom they depend for details of administration, the most satisfactory results, so far as executive work is concerned, are likely to be accomplished.

Our associates of the Commission, as we are informed, will report to the Department the advisability of so modifying the instructions of May 15, 1883, as to exclude from assessments for duty all packages that happen to be outside packages. This plan would relieve from duty, for example, the barrels containing cement that may have been purchased by the barrel quantity, and the boxes of goods that may have been purchased by the box quantity, where the box has been the only covering; and there certainly could be no mistake among intelligent officers as to what might be, and what might not be, the outside covering of imported merchandise.

It may be said, perhaps, in favor of the views which we have the honor to present, though they may, perhaps, be called extreme, that if *ad valorem* duty, under the new law, is to be assessed on the naked merchandise, as it may be called, only, and not upon any covering or incidental accompaniment that may be with the goods, the system would be so precise and so clearly outlined as that the uniformity of action on the

part of subordinates could scarcely be less complete than it would be under the plan suggested by our colleagues.

The issue seems, therefore, to confine itself to the inquiry as to what is the legal effect of the new act; in other words, what does the law require custom officers to do in the premises?

While we are anxious as subordinates of the Department to carry out with greatest care the instructions of the Secretary, we understand that, as members of the Commission referred to, we are expected to exercise freedom in the discussion of the points presented to us.

Department circular of May 15, 1883, refers to the fact that on November 16, 1865, the Secretary of the Treasury (Mr. McCulloch) declared that he regarded the market value or wholesale price of an article to be whatever such article sells for in the market for cash, and that it is quite immaterial whence such value is derived, whether from labels or any other cause or device whatsoever. "The wholesale cash price," he declared, "is the pertinent inquiry, and not the reason why an article obtains that price."

Inasmuch as our Commission was requested to express itself regardless of the instructions contained in the circular of May 15, 1883, we feel that we may speak with equal freedom notwithstanding the prior circular of November 16, 1865. Inasmuch as bottles are subject to special provision under the Act of March 3, 1883, we can, perhaps, best discuss the circular of November 16, 1865, by considering boxes and boxing a substitute for bottles and bottling, with respect to Secretary McCulloch's suggestion.

We respectfully submit, in the first place, that it is not improbable that the views expressed by Secretary McCulloch were the accompaniment, in part, at least, of certain decisions of the courts, which we shall refer to again, published at about the time his circular was issued. But, in the second place, we submit that, according to those very decisions, if it were, in fact, the custom at that time to sell the contents of boxes at one price, and to obtain the boxes separately, and, if you please, through another party than the vendor of the contents, at a separate price, the market value of the merchandise for assessment of duty would be the cost

of the contents alone, and not the cost of the boxes as an addition.

The same general statement would be applicable to the appeal of Dix & Steiner, referred to in circular of May 15, 1883, in connection with which it was held by Secretary McCulloch, January 30, 1866, that the market value of oranges and lemons is to be found when they are in the condition in which they are bought and sold—that is, in their true commercial state for traffic. He then stated that he was of the opinion that boxes, &c., became merchandise when they enter into value, and were sold with the articles they contained. But how could they have entered into the value of the article they contained when they were a separate and distinct article altogether? This is a misuse, as we respectfully submit, of language on the part of Secretary McCulloch. We have no doubt that such boxes were valuable, and that when they were sold with the articles that they contained the amount of purchase-money paid by the vendee was augmented by just so much as would cover the value of the boxes, but it was the boxes that were thus paid for, and not the merchandise they contained.

Let us next refer to the case of Cobb against Hamlin, referred to in said circular of May 15, 1883. It is true that Judge Clifford, in his decision, used the words quoted in Department circular, but the case upon which he was then passing was an instance of the purchase of the contents of packages in bulk by the thousand. It was not the case of a purchase of goods, together with the packages containing them, in connection with which purchase a gross price had been paid covering the value of coverings and contents together. He refers in the enlargement of his view, and in the statements not applicable to the case he had under consideration, but to possible other cases, to packages for preservation and convenience in shipping.

Let us here refer to ribbons wound about blocks, with ribbon-papers to preserve the ribbon from contact with itself, and in cartons of a dozen or more rolls, which cartons in turn may be packed in larger cases of any size. Our colleagues who differ with us would apply the present law only to the outside case. But where are we to draw the line at what is required for preservation and convenience in the shipping of goods,

so far as ribbons are concerned, at least, unless we draw it where the manufacturer puts his ribbons into the shape or arrangement which never changes until they are used by the final consumer. We apprehend that the blocks, the ribbon-papers, and cartons are quite as necessary for preservation and convenience in the shipping of ribbons, as are the outside cases that include them.

Referring again to the said decision of Judge Clifford, he uses the words, quoted in the circular, "no doubt is entertained that the words 'actual market value,' without more, would include the cost of the box, package, or covering in all cases where the merchandise in question was actually purchased in the box, package, or covering, and is usually so purchased and sold for shipment in the foreign market, and where the price includes the box, package, or covering, as well as the goods therein contained," we respectfully inquire, are these clauses of the decision to be considered as conjunctive or disjunctive by the use of the word "and"? They would seem to be intended for conjunctive clauses. If so, then three conditions must exist to meet the case imagined—that is to say, the merchandise in question must first be actually purchased in the box, package, or covering; secondly, it must be usually so purchased and sold for shipment in the foreign market; thirdly, the price must include the box, package, or covering, as well as the goods therein contained—that is to say, we suppose there must be one statement of price. But suppose, as is frequently the case, there be two statements of price, one for the contents of the inner packages and another for the cost of the inner packages, as in the case of artificial flowers, which are bought in bulk and arranged afterwards in cartons, all separately by the vendee, according to his taste and convenience, before packing in the outside case. If this method of statement should happen to represent the facts as to an actual purchase, but should not be according to the usual custom of purchasing and selling for shipment in the foreign market similar goods, what then?

Again, if the usual custom of purchase and sale for shipment in the foreign market was according to this method, and the importer or vendee happened to make his purchase according to a gross price to include cartons and contents, might there or might there not be a

separation of the items according to the value of the contents and the value of the inside coverings or cartons? It occurs to us that the distinguished judge whose decision we have quoted was either a little careless in the arrangement of his expressions, or else without that knowledge of mercantile methods and transactions that might have served to guide him toward a clearer elucidation of his ideas. It may seem presumptuous on our part thus to speak, but called upon as we are to deal constantly with actual importations, we submit that we have in nowise been guilty of exaggeration.

We next refer to the case of Grinnell vs. Lawrence, (1 Blatch. C. C. R., p. 128,) wherein Judge Nelson says that "the market value of goods at a given port includes all previous costs and charges of production and of transportation to and delivery at that market." Let us recur to the facts of this case. It related to a cargo of Canton goods, shipped from Canton to London, and thence to New York. In collecting duties on them the freight from Canton to London was added as part of the dutiable value, and it was held that this charge was not authorized by section 16 of the act of August 30, 1842. It was also held that even if this freight was a proper charge it would form no part of the appraised value of the goods, and its addition would not authorize the imposition of the 20 per cent. penalty under section 8 of the act of July 30, 1846. The judge held it to be "clear that the costs and charges referred to mean those that have been incurred subsequent to the purchase of the goods and in the course of their shipment to the United States, not costs or charges that may have been incurred in any previous shipment of them to the place whence they were exported to this country. The latter enter into and form constituent parts of the market value or whole sale price of the goods at the place of exportation. To add them again would be including the same charges twice in fixing the valuation."

The mere statement of this case will show that it is quite a different affair from the matter which we have now under consideration. Indeed, an inquiry similar somewhat to that embraced in the case of Grinnell against Lawrence, is under present consideration at this port with regard to wool shipped from Tiflis, in Russia, to Marseilles, and thence to the United States,

the question being whether, under the conditions of shipment, Tiflis is to be considered the market for determining the value upon which duty is to be assessed, or Marseilles. If it should be decided that Marseilles is the proper market, there will be no doubt that the cost of shipment to that port will, all other things being equal, be a necessary addition to the value at Tiflis, not, we submit, as a charge, properly speaking, but as an expense necessarily incurred, which must be included in the order of business, as it is usually conducted, in any price at which the owner of the goods would have been willing to sell them at the port of Marseilles.

Great stress has been laid upon the condition of things that existed, as already suggested, during the year 1865, by virtue of a law to the effect that all acts or parts of acts requiring duties to be assessed upon commissions, brokerage, cost of transportation, shipment, transshipment, and other like costs and charges incurred in placing any goods, wares, or merchandise on shipboard, shall be repealed, and expressly providing, in conclusion, that all acts and parts of acts inconsistent with the provisions of said act are hereby repealed.

The decision, referred to, of Judge Clifford was rendeaed under a state of affairs existing by virtue of this repealing act, and it is on this account that his decision is considered by some of our colleagues as of special application and force. This is not an unreasonable view; but, as we have already indicated, we cannot consider that decision as determinative of the present issue, and we are led also to invite attention again to the very positive affirmative expressions contained in the provisions of section 7 of the act of March 3, 1883, which, we submit, render the existing act, if possible, of wider scope and more positive indication than was the repealing act of 1865.

With a view of further elucidating the practical bearings of the present inquiry, let us remind you that there are what we may generally classify as three kinds of inside coverings of imported merchandise. The first are like the cartons containing ribbons, of no use practically when the ribbons are finally sold to the consumer from the retail store. The second are like the boxes containing blacking, which, though often discarded by the shoe-black, he preferring to spread

his blacking out upon a board or in a wooden box, are generally retained by the final consumer until the contents are exhausted, when the box is thrown away. The third class will be represented perhaps by the so called "Wedgwood" style of bottles or jugs, in which a certain sauce is imported into the United States. The bottles or jugs are valuable, beautiful, and form a means of advertisement and temptation to the inquiring consumer; but when the sauce is used they may be permanently adopted, and with very excellent effect, for toilet use. We have also a subordinate division of coverings, like the razor-case, fit only for a razor, and different from the "Wedgwood" ware in that it is the usual or customary covering for the razor. We are led to believe that coverings of this last description, according to the uniform rulings of the Department under the views which we hold of the existing statute, would not be subject to assessment for duty, while the class of coverings such as are illustrated by the "Wedgwood" ware might, without conflict with our conclusions, be assessed for duty according to what they may happen to be or the material of which they may happen to be composed; or, in other words, as merchandise different in character from the contents. With reference to coverings like the blacking-box, which generally remain with the contents until the same are finally consumed, and are then no longer useful, practically, for any purpose, no duty upon them, according to our view, could be properly imposed. And this view would have more direct application still to the case of the cartons for ribbons. In short, the covering, which after final use in connection with its contents should then remain an article of value for additional use, might be classified and assessed according to what it might be, or its dutiable character. All other coverings, as we have reason to believe, would, under the existing law, not be subject to duty in connection with imported merchandise.

In conclusion, we call attention to the provisions of section 7, which, after repealing sections 2907 and 2908 of the Revised Statutes, and declaring that none of the charges imposed by said sections or any other provisions of existing law shall be estimated in ascertaining the value of goods to be imported, uses the word "nor," and, therefore, by way of additional emphasis, declares against estimating for

value, in connection with duties, "the usual and necessary sacks, crates, boxes, or covering of any kind." We confess that we fail to discover any language that would be more comprehensive than is this by way of embracing the "sacks, crates, boxes, or covering" within which merchandise may be contained.

But it may be claimed that the penalty proviso of section 7 applies evidently to outside coverings, and is therefore a conclusive guide to us in the interpretation and limitation of the direct phrases that precede it. In this connection, we submit, in the first place, that, according to the general rules of statute interpretation, if we are able to find a reasonable meaning for the proviso clause that will harmonize with the direct statement of the section, it is proper that we should do so rather than, by the use of an interpretion that would conflict with the direct declarations, thereby narrow down the latter.

The objectors in this connection dwell upon the phrase in the *bona fide* transportation "of the goods to the United States." If, instead of the preposition "in," we had the word "for," there would be more reason than there now seems to be for the idea expressed, namely, that the package must be one necessary, specially, and peculiarly, if not exclusively, *for* the shipment of the goods across the ocean. But, we answer the word "for" is not used, and the preposition "in" is used, and it is not, we submit, an unreasonable definition of the word "in," as used, to say that it means "in connection with." If this definition be just, then the packages alluded to may be as properly inside ones as outside ones.

But let us analyze this paragraph further. We discover at once that there are two phrases descriptive of the offence to be punished by the assessment of a duty of 100 per cent. The first is embraced in the phrase "of any material or form designed to evade duties thereon;" the second, in the succeeding phrase, "or designed for use otherwise than in the transportation of goods to the United States." We submit that i would seem from this that there were coverings though of which might result in the evading of duty upon im ported merchandise, properly subject to duty unde the law, that might not be in the nature of the exterio package that would be useful, particularly in connec tion with ocean transportation. It would seem, in

deed, as if Congress had used the first of these disjunctive clauses to convey the idea that the packages, &c., referred to were all such as could be used in connection with the enclosure and transportation of goods.

But we submit that our view is further emphasized by the well-known fact that the boxes, coverings, &c., intended in themselves as valuable merchandise, and not as the mere covering for contents, are almost without exception such articles as would be packed *within* an exterior case, and would in scarcely any instance be the exterior case or covering itself.

It will not be forgotten that section 2907 (repealed) referred in its concluding portions to "all charges of a general character incurred in the purchase of a general invoice," which charges, it declared, should "be distributed *pro rata* among all parts of such invoice." This phrase, "all charges of a general character," it is believed, was not limited in its application to the charges which were incurred in the final arrangement of the goods for shipment across the ocean only.

Then, it will be remembered, too, that section 7 of the act of March 3, 1883, not only repealed sections 2907 and 2908 of the Revised Statutes, but also section 14 of the act entitled "An act to amend the customs-revenue laws, and to repeal moieties," approved June 22, 1874. The latter act, as appears in the letter, before referred to, of the appraiser of the port at New York, to the collector, dated April 11, 1883, describes, among the things that shall be added to the invoice for assessment of duty, the "cost of packages, boxes, or other articles containing such goods, wares, and merchandise, or any other incidental expenses attending the packing, shipping, or exportation thereof."

Thus it appears that any "packages, boxes, or other articles" in which the goods were contained were embraced within one of the provisions of law repealed, and if it be claimed that the words "packing, shipping, or exportation thereof" tend to limit the preceding expression, the answer is that the packing of goods begins not with the addition of the exterior case or covering, but with the articles that are first used in the arrangement of the goods for the use of the purchaser, whoever he may be, or whatever he may be—whether he be the home consumer, living in the neighboring town or village or that of the manufacturer, or the

American importer, purchasing the goods for final consumption in the United States. And, indeed, the Treasury Department has not failed to make its record in connection with the question as to whether the cost of cartons, which are, so far as our experience goes, universally inside coverings in respect to merchandise imported into the United States, is to be considered a charge embraced within the provisions repealed by section 7 of the act under consideration.

We refer in this connection to Treasury decision (3735) of October 4, 1878. In that decision the Department uses the expression, "You state that it has heretofore been the custom to regard as included in the invoice value charges for cartons and packing of various descriptions of merchandise," and then goes on to apply a rule of action, thereby indicating that the cost of cartons was referred to as a charge, and that the packing was a term used in connection with the putting up of the goods generally, and not merely the final arrangement of them within the cases intended for ocean transportation exclusively.

But still more indicative of the Department's opinion is decision (2620) of January 22, 1876. The Department says: "In this connection, however, the Department would state, for the information of the appraiser, that in its opinion cartons and other inside coverings of merchandise, which are bought and sold with the goods they contain, are not subject to a separate rate of duty, but are dutiable at the same rate as the goods, (under the provisions of section 2907 of the Revised Statutes), unless they are unusual in character and possess an extraordinary or excessive value."

Now, it may be said, and truly, that the words enclosed in parenthesis—"under the provisions of section 2907 of the Revised Statutes"—might have been left out, and the decision in question have been just as effective in connection with the inquiries submitted as it is with the parenthetical clause in it. This is all true; but if the decision had been so framed, it would not have been as useful as it now is for us in the discussion of the question at issue, for the reason that the parenthetical clause is equivalent to a distinct declaration on the part of the Department that the cost of cartons and other inside coverings of merchandise are charges which are to be classified as coming within the phraseology or scope of section 2907 (repealed), and

not within the phraseology or scope of section 2906, that remains. Of course we all understand that the decision in question was one that in its purpose related to the dutiable value reachable under the provisions of the former tariff act, and not to anything that would be required under the act of March 3, 1883.

Permit us to instance, as a curious feature of the practice existing under present instructions, that cigars, which are subject to a double duty—that is, according both to their weight and their value—are, when the weight duty is imposed, made subject to a weight which is reduced by the amount of tare allowed for the boxes, while the value upon which ad valorem duty is to be assessed must include the cost of those very boxes allowed for as tare in respect to the weight; in other words, the cigars alone are the merchandise for purposes of weight, but the boxes become cigars for purposes of valuation. Is not this an inconsistency?

It is well settled by the courts that the title of an act cannot be made to extend or to restrain any positive provisions contained in the body of the act. It is only when the meaning of these is doubtful that resort may be had to the title. It is also well settled as to statutes that when the intent of the legislators can be discerned it should prevail, and only when the language of the act is of doubtful meaning is it that courts are authorized to indulge conjecture as to the intent of the legisislature or to look to consequences in the construction of the law.

We submit in this connection that the positive declarations of section 7 of the act of March 3, 1883, and which seem as plain and wide for the purpose considered as language can make them, should be regarded as controlling rather than any subordinate phrases used in connection therewith, respecting which the most that can be said, even by those who oppose our view, is that they are doubtful in meaning and expression (which latter view, however, we do not agree to, so far as the present consideration is concerned, as we have endeavored to explain).

The title of the act of March 3, 1883, embraces the idea that it is for the reduction of the revenue, and according to the doctrines set forth in 2 Cranch, 358, the title of said act claims a degree of notice and should have its due share of consideration. And if the pres-

ent controversy should be considered as involving a case of ambiguity, the construction should be in favor of our importers of foreign merchandise rather than otherwise, as duties are never to be imposed upon the citizen on vague or doubtful interpretations, and for our authority in this regard we refer to the decision of Judge Nelson in the case of Powers and others against Hiram Barney, reported in 5 Blatchford's Circuit Court Reports, p. 202.

As a final indication of the intent of Congress, let us compare the oaths prescribed by the act of March 3, 1883, with those required prior to the adoption of that act.

Take first the oath prescribed for consignee, importer, or agent under the existing law. It says, in conclusion, "that the invoice now produced by me exhibits the actual cost or fair market value at the time or times and place or places when or where procured of the said goods, wares, and merchandise, *including all cost for finishing* said goods, wares, and merchandise to to their present condition."

Take next the oath prescribed where merchandise has been actually purchased. The phrase is "that the invoice which I now produce contains a just and faithful account of the actual cost of said goods, wares and merchandise, *including all cost of finishing* said goods, wares, and merchandise to their present condition."

Next, the oath of manufacturer or owner in cases where merchandise has not been actually purchased. It must declare that the invoice produced "contains a just and faithful valuation" of the merchandise at its "fair market value at the time or times and place or places when and where procured," and "that the said invoice contains also a just and faithful account of *all the cost for finishing said goods, wares, and merchandise to their present condition.*"

But by the tariff act now superseded the phraseology of the oaths was as follows:

As to the consignee, importer, or agent, the phrase was "that the invoice now produced by me exhibits the actual cost or fair market value at the time or times and place or places when or where procured of the said goods, wares and merchandise, *all the charges thereon*," &c.

In the next case, the merchandise actually purchased by the owner, the phrase was "that the invoice which

I now produce contains a just and faithful account of the actual cost of the said goods, wares, and merchandise, *of all charges thereon, including charges of purchasing, carriages, bleaching, dyeing, dressing, finishing, putting up, and packing.*"

Then as to the oath of manufacturer or owner in cases where merchandise has not been actually purchased, the phrase was, "the invoice which I now produce contains a just and faithful valuation of the same at their fair market value, *including charges of purchasing, carriages, bleaching, dyeing, dressing, finishing, putting up, and packing*, at the time or times at the place or places when and where procured for my account; that the said invoice contains also a just and faithful account of all charges actually paid," &c.

The distinction between expenses which are incurred in the finishing of goods or the bringing of the fabric or other article purchased into the state required by the vendee, as, for example, the bleaching of cotton embroideries, and the finishing expenses connected with the stiffening or ironing of the same, on the one hand, and the charges incidental to cartons, boxing, &c., on the other, is well understood by every merchant at all familiar with the importing business and by every Government officer at all familiar with the practice of importers and the appraisement of imported merchandise.

Cloths, for example, of many descriptions must be "calendered," as it is called, before they have upon the surface of the fabric a certain appearance or style, which is part, as indicated, of the finishing. Kid gloves, as usually imported, must be provided with buttons. Braids and similar articles that are to be cut to lengths suitable for the use of the vendee must be so cut to lengths before the article is considered finished for the purposes of the same. And so we might illustrate by many other references, but these are sufficient at once to suggest the difference between that which is known as a "finishing expense," described in the forms of oaths now in vogue, and the expenses incidental to packing, boxing, &c., covered by the provisions of the former tariff act which are now repealed.

Our conclusion, therefore, is, as already indicated, that section 7 of the act of March 3, 1883, throws us

back for assessment of *ad valorem* duty, upon the value of what we may call the naked merchandise alone.

Very respectfully, your obedient servants,

A. P. KETCHUM,
THOMAS G. RICE,
J. M. FISKE.

HON. CHAS. J. FOLGER,
Secretary of the Treasury,
Washington, D. C.

Mr. E. B. Moore, U. S. Appraiser at Philadelphia, in the course of a report to the Secretary of the Treasury under date of August 16, 1883 said:

"THIRD. And all other actual or usual *charges* for *putting up*, *preparing* and *packing* for transportation or shipment.

"The main difficulty in uniformly administering the act of March 3, 1883, lodges in this last, or *third* item. It is difficult in many instances to draw a line of distinction between coverings and merchandise. Some members of the Commission held that the act of March 3, 1883, exempted everything from duty except the naked merchandise imported. Others, that nothing was exempt from payment of duty except the outside boxes or sacks in which the merchandise was imported. My own position was one rather of middle ground. *In general terms, I believe, that the act above quoted exempts everything from payment of duty that can fairly be considered a covering incident to the transportation and shipment of the merchandise, whether it forms the "outside" or "inside" coverings, or both.*

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In the Supreme Court of the United States.

OCTOBER TERM, 1885.

REECE M. OBERTEUFFER ET AL., plaintiffs in error,
vs.
WILLIAM H. ROBERTSON, collector.
No. 1192.

BRIEF FOR THE DEFENDANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

REECE M. OBERTEUFFER ET AL., plaintiffs in error,
vs.
WILLIAM H. ROBERTSON, collector.
No. 1192.

BRIEF FOR THE DEFENDANT.

This suit was originally brought in the superior court of the city of New York and removed by *certiorari* to the circuit court of the United States for the southern district of New York. The object of the suit was to recover certain duties alleged to have been illegally exacted. The jury having rendered a verdict for the defendant, judgment was pronounced in his favor, and from that judgment this writ of error has been sued out.

The errors assigned are as follows: (1) That the said judgment ought to have been given for the said plaintiffs against said defendant; (2) that the judge erred in directing a verdict for the defendant; (3) that there was error in refusing to direct a verdict for the plaintiffs; (4) the plaintiffs assigned for error the several pleadings, instruc-

tions, and refusals to instruct which were made by them as ground for exception upon the trial.

In the first place, we submit that the plaintiffs in error have mistaken their remedy, and that they should have applied for a reappraisement. As a preliminary to the ascertainment of the value of the merchandise it is necessary to ascertain what the merchandise is, and the decision of that question belongs exclusively to the appraisers. Section 2930 of the Revised Statutes provides that—

> If the importer, owner, agent, or consignee of any merchandise shall be dissatisfied with the appraisement and shall have complied with the foregoing requisitions, he may forthwith give notice to the collector, in writing, of such dissatisfaction; on the receipt of which the collector shall select one discreet and experienced merchant to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and appraise the same, agreeably to the foregoing provisions; and if they shall disagree the collector shall decide between them; and the appraisement thus determined shall be final and be deemed to be the true value, and the duties shall be levied thereon accordingly.

In Bartlett *vs.* Kane (16 How., 263) this court held that the decision of the Government appraisers is final if not appealed from. In that case the plaintiff complained that the appraisers, instead of estimating the value of the Peruvian bark according to the cost price in the markets of its production, under the directions of the Secretary of the Treasury caused a chemical analysis of samples to be made to ascertain the quantity of sulphate of quinine it

contained, and, having ascertained its relative intrinsic value with other imports of the same article, regulated its appraised value by a comparison with the costs of such imports. Mr. Justice Campbell, in delivering the opinion of the court, said:

> The appraisers are appointed with "powers by all reasonable ways and means to ascertain, estimate, and appraise the true and actual market value and wholesale price" of the importation. The exercise of these powers involves knowledge, judgment, and discretion, and in the event that the result should prove unsatisfactory a mode of correction is provided by the act. It is a general principle that when power or jurisdiction is delegated to any public officer or tribunal over a subject-matter and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter. The only questions which can arise between an individual claiming a right under the acts done and the public or any person denying their validity are power in the officer and fraud in the party; all other questions are settled by the decision made or the act done by the tribunal or officer, whether executive, legislative, judicial, or special, unless an appeal is provided for or other revision by some appellate or supervisory tribunal is prescribed by law (U. S. *vs.* Arredondo, 6 Pet., 691).
>
> The interference of the courts with the performance of the ordinary duties of the executive departments of the Government would be productive of nothing but mischief; and we are satisfied that such a power was never intended to be given to them (Decatur *vs.* Paulding, 14 Pet., 499). The interposition of the courts in the appraisement of importations would involve the collection of the revenue in

> inextricable confusion and embarrassment. Every importer might feel justified in disputing the accuracy of the judgment of the appraisers and claim to make proof before a jury months, and even years, after the article has been withdrawn from the control of the Government and when the knowledge of the transaction has faded from the memories of its officers. The consignee, after he has been notified of the appraisement, is authorized to appeal. * * * The appeal is one of the reasonable ways and means allowed to the importer for ascertaining the true and dutiable value, paramount in its operation to any other when actually employed, but until employed not superseding those confided to the officers.

In Stairs *et al. vs.* Peaslee (18 How., 521), this court held (Mr. Chief-Justice Taney delivering the opinion) that in estimating the value of merchandise it was the duty of the appraisers to determine what were the principal markets of the country from which it was exported into the United States, and their decision that London and Liverpool were the principal markets for that article was conclusive.

In Belcher *et al. vs.* Linn (24 How., 508,) this court held (Mr. Justice Clifford delivering the opinion) that in the absence of fraud the decision of the appraisers as to the character of the article and the dutiable value of the importation was final and conclusive. In that case the article imported was called in the invoice "concentrated molasses," which is sirup boiled down to a denser consistency and thus evaporating the watery particles until the point of crystallization is reached. The appraisers decided that this article was in point of fact a species of green sugar, and that the invoice and entry were erroneous,

not only with respect to the value affixed to the article, but also as to its description. Green sugar was subject to an export duty, but molasses was not. They therefore added, as appeared by their report, a sum equal to the amount of that duty, although none such had been paid, but a statement annexed to the report described the addition made thus: "to add export duty on."

The court held that the report and statement must be construed together, and that by their true construction they showed, irrespective of the parol testimony that the addition was made not as an export duty, but to bring up the invoiced valuation to the actual market value of the merchandise at the place of exportation. (See also *Tappan* vs. *United States*, 2 Mas., 393; *Harding* vs. *Whitney*, 11 Int. Rev. Rec., 103; *Kimball* vs. *The Collector*, 10 Wall., 436.)

It is incumbent upon the importer to show, in order to recover, that he has fully complied with the statutory conditions which attach to the statutory action provided for. (Annson *et al. v*°. Murphy, decided by this court at its present term, Mr. Justice Blatchford delivering the opinion.)

In the second place, we submit that the plaintiffs were not entitled to recover in the court below upon the mere ground that the action of the customs officials was wrong; but it was incumbent upon them to show that the position which they took in their protest was right. It will be seen that the plaintiffs' protest stated substantially but a single ground of objection to the collector's liquidation, which was that the cartons were not liable to duty. In order to defeat their action, therefore, it was only necessary for the defendant to show that the cartons were not exempt

from duty. At the trial the learned judge of the circuit court held that the cartons were liable to duty as separable articles of import, under the schedules of the act of March 3, 1883. If they are not usually treated as a part of the goods themselves, and are not regarded as practically essential to commercial dealing in the particular goods, they should be classified and assessed according to their "dutiable character," and are liable to duty as "paper boxes."

In the third place, we submit that the cartons were so indispensable to the gloves and hosiery that they did not constitute a distinct element of price or market value according to the usage of trade, but were properly merged in and treated as part of the price of the articles themselves. The evidence shows that they were designed for use otherwise than in the *bona fide* transportation of goods to the United States.

In the deposition of Alphonse Christlieb, page 15 of the record, he says:

> They put all goods in those boxes exactly like those that you see here, and then the boxes were put up again in cases. The goods were put in these small boxes, and then linings were put in the cases, and the boxes packed in those cases that they might come into this market inside of the cases.

And again, on page 17, he says:

> In box exhibit No. 1 there were half a dozen of the goods contained in each box. In box No. 2, half a dozen in each box; in No. 3, one dozen in a box, or two half dozens, a half dozen in each layer; in No. 4, half a dozen in a box; in No. 5, half a dozen in a box; in No. 6, a full dozen in a box, inclosed in one package.

And again, on page 18, he says:

> They give us the price, including cartons, for convenience sake. * * * But, as a general rule, they understand you want cartons, and they give you at once the price for cartons included, and you must state you do not want cartons.

And again, on page 19:

> When goods like these samples are unpacked from the cases in which they come across the ocean we take out the cartons and they are useful again for the transportation of the goods until they reach probably the retailer, who will then afterwards deal them out to the customers who wear them.

Again, on page 20:

> Cartons may in some way facilitate for the retail trade, because they can easier find the goods. They have got labels on and they see the labels, so many gloves and such and such styles, and you keep the styles all together in the box, and they don't get mixed up, and if they were loose there might be mistakes, and you would have to label a ticket probably on every pair; but in that box they are labeled and you know what is in the box, and if they were loose you would lose control over the goods. It is the custom to keep them in the boxes until they go to the retailer.

Again, on page 21:

> The label on the end of the box was there when the goods were imported. They are put on to classify the style, for the convenience that when we sell the goods we know what the contents of the box are, the number of dozens, and the size of the foot, and also describe the goods by name.

Again, on page 22:

> It is the custom of the trade if I buy goods that he has to give me the cartons, too; but I know if I wanted them without cartons, it is understood perfectly that I would tell him, and I would get the goods so much less. I could buy considerably less if I did not want cartons. In a case where nothing is said about cartons, I would not regard it a good delivery if they came packed in bundles.

Again, on page 23:

> Those goods for America are mostly sold in boxes, nine-tenths of them, I should say; it depends on the trade; if a man wants them very cheap, to sell them cheap, he might buy without the cartons, but usually it is not good for the trade to have them without cartons.

In the deposition of Cart Winckler, page 23, he says:

> If an American comes into my store and wants to buy goods I don't ask him if he wants them in boxes, because it is a well known fact that he wants them in boxes, and I give him my price for box included.

The foregoing extracts from the testimony show conclusively, we think, that according to the usage of trade in Germany—

> Gloves and hosiery when intended for the markets of the United States are usually prepared for sale by the manufacturers in cartons, not for the purpose of transportation, but because the purchasers for our markets prefer them put up in that form, and the manufacturers there ordinarily include the price of the cartons in the price of the gloves and hosiery. The cartons are preferred because the goods are more conveniently kept and handled by retailers in that form than when loose.

The question whether the value of the cartons should be included in the dutiable value of the merchandise depends upon the construction to be placed upon section 7 of the act of Congress of March 3, 1883, entitled "An act to reduce internal-revenue taxation, and for other purposes." That section reads as follows:

> That sections 2907 and 2908 of the Revised Statutes of the United States, and section 14 of the act entitled "An act to amend the customs revenue laws and to repeal moieties," approved June 22, 1874, be, and the same are hereby, repealed, and hereafter none of the charges imposed by said sections or any other provisions of existing law shall be estimated in ascertaining the value of goods to be imported, nor shall the value of the usual and necessary sacks, crates, boxes, or covering of any kind be estimated as part of their value in determining the amount of duties for which they are liable: *Provided*, That if any packages, sacks, crates, boxes, or coverings of any kind shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the bona fide transportation of goods to the United States, the same shall be subject to a duty of 100 per centum ad valorem upon the actual value of the same.

Under the law as it stood in the Revised Statutes the dutiable value of goods consisted of two elements: First (under section 2906), the actual market value or wholesale price of the merchandise in the principal markets of the country from whence exported and at the period of exportation to the United States. To this was added by section 2907 the—

> Cost of transportation, shipment, and transshipment, with all the expenses included, from the place

> of growth, production, or manufacture, whether by land or water, to the vessel in which shipment is made to the United States, the value of the sack, box, or covering of any kind in which such merchandise is contained, commission at the usual rates, but in no case less than 2½ per centum, and brokerage, export duty, and all other actual or usual charges for putting, preparing, and packing for transportation or shipment.

It will be seen that section 7 of the act of March 3, 1883, repeals sections 2907 and 2908 of the Revised Statutes, which latter imposed an additional duty in certain cases for failure to add the charges specified in section 2907. We insist that the proper construction of section 7 is that it repeals only that portion of the pre-existing law which added to the actual market value or wholesale price of the merchandise the cost and charges incident to the shipment of the goods after they were put in a condition for the market as usually sold.

It is true that section 7 exempts from duty "coverings of any kind," but the only law which made "coverings of any kind" subject to duty is found in section 2907. We submit that only the "coverings of any kind" which are embraced in section 2907 of the Revised Statutes are affected by section 7 of the new law. The effect of section 7 is not to change the actual market value of the goods, but leave that to be considered as the dutiable value. If we are correct in this view, it follows that a "covering of any kind," which is not incident to the transportation of the goods, but is a part of their preparation for sale in the markets of the country of exportation, is not affected by section 7. When a box of shoe-blacking

is sold the value of the box is included in the value of the blacking. When a box of matches is sold the value of the box constitutes a constituent element in the value of the matches; and so with an opera-glass and its case, an umbrella and its cover, a violin and its case, jewelry and its case, a mathematical instrument and its case, &c.

In these examples, and others which might be mentioned, the box or case forms an integral part of the value of the merchandise. They are not coverings in the sense contemplated by law as necessary to the transportation and shipment of the articles. They are something more. They enter into and form a part of the value of the articles themselves.

In Cobb *vs.* Hamlin (3 Clifford's Reports, 200) Judge Clifford said:

> Some descriptions of goods are purchased and sold in the foreign market in bulk, and are subsequently to the purchase and sale put into boxes, packages, or coverings by the purchaser for the preservation of the merchandise and the convenience of shipment. Other descriptions are put into boxes, packages, or coverings by the purchaser, manufacturer, or wholesale merchant in the foreign country, and the merchandise is there purchased and sold for exportation in the boxes, packages, or coverings in which it was so placed by the purchaser, manufacturer, or wholesale merchant.
>
> The actual market value in the former case does not include the cost of the box, package, or covering within the meaning of that act of Congress, as the boxes, packages, or coverings in such cases are purchased by the shipper as the means of preserving the goods and for the convenience of shipment. But no

doubt is entertained that the words "actual market value" without more would include the cost of the box, package, or covering in all cases where the merchandise in question was actually purchased in the box, package, or covering, and is usually so purchased and sold for shipment in the foreign market, and where the price includes the box, package, or covering, as well as the goods therein contained (*Barnard et al.* v. *Morton*, 1 *Curtis*, 412; *Grinnell* v. *Lawrence*, 1 *Blatch.*, 350; *Belcher* v. *Linn*, 24 *How.*, 535; *Knight et al.* v. *Schell*, 24 *How.*, 530; *Wilson* v. *Maxwell*, 2 *Blatch.*, 35.)

In Harding *vs.* Whitney, before Judges Clifford and Lowell, in the circuit court of the United States for the district of Massachusetts (11 Internal Revenue Record, 103), it was held that "where the price paid for merchandise in boxes, packages, or bales, purchased in a foreign market, includes such covering, the words 'actual market value,' as used in the sixteenth section of the act of August, 1842, includes the cost of the covering as well as that of the goods themselves."

The provisions of law now in force for determining what duties shall be exacted on imported goods are the schedules of the tariff act of 1883, and section 2906 of the Revised Statutes, which defines the value to be ascertained as being the actual market value or wholesale price of the merchandise at the period of exportation to the United States in the principal markets of the country from which the merchandise is imported. What is the merchandise? It is the thing which is bought and sold in the principal markets of the foreign country, and includes every charge incurred in putting the merchandise into the

condition in which it is bought and sold *there*. It is undoubtedly true that in a certain sense the cost of cartons is a charge, but it is a charge in the same sense that embroidery, dyeing, bleaching, transportation from the manufactory to the market are charges. It is a charge in the same sense that the box is a charge upon the blacking, that the case is a charge upon the violin, or the cover upon the umbrella. It is a charge which is merged in the value of the merchandise and becomes part and parcel of it.

Again, it will be seen by an examination of the new oaths provided in section 8 of the tariff act of 1883 that they require the importer to swear that his invoice exhibits the fair market value, "including all cost of finishing such goods, wares, and merchandise to their present condition." Section 9 provides for an appraisal under certain circumstances "by ascertaining the cost or value of the materials composing such merchandise at the time and place of manufacture, together with the expenses of manufacture, preparing, and putting up such merchandise for shipment."

Besides, it will be seen that the proviso contained in the seventh section is as broad and comprehensive as the repealing and affirming provisions of that section. The proviso shows that the charges which are exempt from duty are those only which are incident to mere transportation to the United States. It is clear, we think, from the proviso contained in the very section upon which the plaintiffs rely that the intention of Congress was to repeal only so much of the law as imposed duties upon such charges as are incident to transportation and shipment. The evidence in this case shows that the gloves and

hosiery were prepared for sale in cartons, not for the purpose of transportation but because the purchasers prefer to have them put up in that form.

We submit, therefore, in conclusion, that in estimating the dutiable value of the gloves and hosiery the appraiser properly added to the price appearing in the plaintiffs' invoices a sum sufficient to cover the cost or value of the cartons also, that having been omitted in the invoice and not included in the cost price of the gloves and hosiery. In this view we are sustained by Judge Wallace of the United States circuit court for the southern district of New York, by the Treasury Department, and by the late Attorney-General, Mr. Brewster.

The opinion of Judge Wallace, the views of the Treasury Department, and of the late Attorney-General will be found appended to this brief.

Very respectfully,

JOHN GOODE,
Solicitor-General.

APPENDIX.

CIRCULAR.

Meaning and effect of section 7 of the act of March 3, 1883 (22 Statutes at Large, p. 523).

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., September 2, 1885.

To collectors and other officers of the customs:

The following decision of the United States circuit court (Wallace, *J.*) for the district of New York, in the case of Oberteuffer *et al. vs.* Robertson, concerning the meaning and effect of section 7 of the act of March 3, 1883 (22 Statutes at Large, p. 523), is published for the information of all concerned.

C. S. FAIRCHILD,
Acting Secretary.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.

OBERTEUFFER ET AL. *vs.* ROBERTSON.

WALLACE, *J.:* The plaintiffs sue for duties which they claim were illegally exacted by the defendant, as collector of the port of New York, upon their importation in July, 1883, of certain gloves and hosiery. The merchandise was purchased by plaintiffs in Chemnitz, Germany, and at the time of the purchase was in cartons. According to

the custom of trade there, gloves and hosiery, when intended for the markets of the United States, are usually prepared for sale by the manufacturers in cartons, not for the purpose of transportation, but because purchasers for our markets prefer them put up in that form, and the manufacturers there ordinarily include the price of the cartons in the price of the gloves and hosiery. For the purposes of shipment and transportation, outside cases inclosing the cartons are used. The cartons are preferred because the goods are more conveniently kept and handled by retailers in that form than when loose. In estimating the dutiable value of the gloves and hosiery, the appraiser added to the price appearing in the plaintiffs' invoices as the cost price of the gloves and hosiery a sum sufficient to cover the cost or value of the cartons also, that item having apparently been omitted in the invoices, and not included in the cost price of the gloves and hosiery, presumably in order to present the main question which has been discussed in this case. That question relates to the construction to be placed upon section 7, of the act of Congress of March 3, 1883, under which the plaintiffs contend that the value of the cartons should be excluded by the appraiser in ascertaining the dutiable value of the goods.

A verdict was ordered for the defendant upon the trial upon the ground that the plaintiffs' protest was insufficient to present the objections relied upon by them to the exaction of the duties in controversy. It is not necessary for the decision of this motion for a new trial to consider the question of the sufficiency of the protest, because the conclusion is reached that the plaintiffs' contention upon the main question is not tenable, and that the verdict should stand because the duties were not illegally exacted.

The meaning and effect of section 7 of the act of March 3, 1883, were carefully considered by the Attorney-General of the United States in his opinion of the date of January 11, 1884. One of the questions presented for his judgment was whether the section prohibits the inclu-

sion in the dutiable value of merchandise of the value of the boxes and coverings which are part of its preparation for sale in the markets of the country of exportation. After a full review of the pre-existing legislation, he answered this question in the negative. His opinion is so satisfactory that it is adopted for present purposes, with a single qualification. He states incidentally that the cost of boxes or coverings with which goods are *ordinarily* prepared for sale in the foreign market, and in which they are *usually* sold and purchased there, must be regarded as entering into or as being an element of the actual market value of the goods. If it is intended by this to indicate that the cost of the boxes or coverings should not be included unless the goods are ordinarily and usually prepared and sold in the foreign market in such boxes or coverings, that suggestion is not assented to. It seems to be founded upon the language of Clifford, J., in Cobb *vs.* Hamlin (3 Cliff., 191, 200), in which case it was said by that learned judge:

> But no doubt is entertained that the words "actual market value," without more, would include the cost of the box, package, or covering in all cases where the merchandise in question was actually purchased in the box, package, or covering, and is usually so purchased and sold for shipment in the foreign market, and where the price includes the box, package, or covering, as well as the goods therein contained.

The precise question on which this part of the opinion was expressed was not involved in that case, and there is no reason to suppose that it was intended to decide that the cost of the box, package, or covering should not be considered as entering into the actual market value of the goods when they are treated as part of the goods, and when the goods are actually purchased in the box, pack-

age, or covering, and the price includes the box, package, or covering as well as the goods contained therein. When section 7 declares that none of the charges imposed by existing law, nor the value of the usual and necessary sacks, &c., shall be estimated in ascertaining the value of the goods in order to determine their dutiable value, the language refers to the actual or usual charges for putting up, preparing, and packing the goods for transportation and shipment, including the sacks, boxes, or covering of any kind in which they are contained, which, by the provisions of section 2907, U. S. Revised Statutes, are to be added to the wholesale price or market value of the goods at the time of the exportation in the principal markets of the country of exportation. Although upon first consideration it would seem that this part of the section was unnecessary if something more than the repeal of section 2907 was not intended by Congress, the clause when read with the proviso annexed to it appears to have been added to the repealing clause in order to emphasize the intent of Congress, and at the same time to denote explicitly that coverings, &c., although employed ostensibly for the purpose of transportation and shipment, should not escape duty if used with the design to evade duty, or for any purpose other than the *bona fide* preparation of the goods for transportation. Section 7 is, therefore, to be construed as merely repealing pre-existing laws so far as they relate to adding the cost and expenses of transportation, shipment, and transshipment, including those of preparing and packing the goods, to the wholesale price or actual market value in the principal markets of the country of exportation in order to ascertain dutiable value. Its effect is to abrogate section 9 of the act of March 28, 1866 (section 2907), and restore the provisions of section 7 of the act of March 3, 1865. While it abrogates the existing provisions for determining dutiable value, it does not contemplate prescribing any new rule

for ascertaining market value. This is to be ascertained by ascertaining the actual value or wholesale price of the goods in the condition in which they are purchased and sold in the foreign market without reference to special preparation for transportation and shipment. The "usual and necessary sacks, crates, boxes, and coverings," which are not to be estimated as part of the value of the goods in determining their dutiable value, are not those which are employed in the preparation of the goods for sale in the markets of the country of exportation, but are those which are usually and necessarily employed in preparing and packing them for transportation and shipment. Whenever, therefore, goods are sold in the markets of the country of exportation, whether usually or only occasionally, in boxes, cartons, or coverings of any kind which make the goods attractive and desirable, and the boxes, cartons, &c., enter into the price there of the goods as merchantable commodities, the boxes, cartons, &c., are accessories of the goods, and actual market value includes them as an element of the value of the goods in the condition in which they are purchased.

In this case the appraiser properly added to the plaintiffs' invoice price of the hosiery and gloves a sufficient sum to include the value of the cartons, the cost or value of which were not apparently included in the invoice price of the goods. He did this in order to determine the market value of the goods in the condition in which they were offered for sale in the principal markets in the country of exportation. If he erred in adding a sum larger than was necessary to include the value of the cartons, the plaintiffs should have applied for reappraisement. They cannot attack his decision collaterally upon the theory that the duties exacted were excessive.

The defendant was entitled to a verdict for these reasons, and a motion for a new trial is therefore denied.

(6185.)

Matches packed in boxes—duty on.

TREASURY DEPARTMENT,
February 20, 1884.

The following decision is published for the information and guidance of customs officers.

H. F. FRENCH,
Assistant Secretary.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., February 20, 1884.

SIR: The Department duly received your letter of October 8, 1883, submitting the appeal (9930 *h*) of H. K. and F. B. Thurber & Co. from your assessment of duty on the appraised value of certain matches imported by them, per "Island," which value included that of the small boxes containing the matches not included in the entry.

In this case the parties named imported into New York, July 14, 1883, certain matches in small boxes, upon which duties were assessed at their value in the boxes. The value of the large packing-boxes, in which the small boxes were inclosed for transportation, was not included in the dutiable value. The value of the small boxes and of the merchandise was stated separately in the invoice. The entry was liquidated August 8, 1883, and the importers protested against the action of the customs officers in assessing duty on the boxes containing the merchandise, contending that duties should only be charged on the value of the matches without the boxes, and that the boxes were exempted from duty as coverings, under section 7 of the act of March 3, 1883.

Under sections 2902 and 2906, Revised Statutes, the actual market value or wholesale price of merchandise at

the period of exportation in the principal markets of the country from which the same has been imported is the value upon which duty shall be assessed.

The question in this case is, whether the value of the boxes containing the matches is to be considered a part of their dutiable value.

The opinion of the Attorney-General of January 18, 1884, giving construction to section 7 of the act of March 3, 1883, has been adopted by this Department for the guidance of customs officers.

According to that opinion, "the cost of boxes or coverings with which goods are ordinarily prepared for sale in the foreign market, in which they are usually sold and purchased there (the price paid for the goods including the box or covering which goes therewith to the purchaser), must be regarded as entering into or as being an element of the actual market value of the goods."

Upon this principle, it is clear that, regarding the point raised by the protest and appeal in this case, the boxes containing the matches formed a part of their dutiable value. The protest does not set forth that the matches were purchased separately from the boxes, so that only the general proposition above stated is in question.

There is evidence in the case, however, tending to show that the matches in question were purchased originally in bulk, the boxes having been bought separately and being intended to contain them. A practice has been adopted under which the matches, if on hand, are purchased in bulk and the boxing of them ordered to be done before the delivery of the goods to the vendee. If the goods are not in stock, they are contracted for in the same general terms.

This is the claim of the importer, which is controverted by American manufacturers. As, however, similar questions may arise as to other imported articles, it may be well to discuss the question in that view.

It should be borne in mind that the article to be ap-

praised is the imported merchandise, and that it is to be appraised at its value in the foreign market at the period of exportation to the United States.

The article imported, the matches, being in boxes, as in this case, may be termed "matches in boxes" or "boxes of matches," as an entirety. Its value is to be fixed not necessarily at the port of exportation, nor at the shop or factory of the manufacturer of either the boxes or matches, but the true value is that of the article thus imported in the principal markets of the foreign country at the time of exportation. The inquiry does not go back of the condition of the article as usually purchased and sold in such markets. Could we trace the matches back to the original raw materials of wood and chemicals, and the boxes to the paper of which they are made, it could not change the character of the article bought and sold and exported, whether manufactured into matches and boxes by the importer himself or by some other person.

Matches in boxes and boxes of matches being articles of merchandise in the condition in which such merchandise is usually prepared for sale, and actually sold and purchased, the question is only as to the value of such merchandise at the proper time and place.

The question is not what this particular invoice cost at the factory, or how it was manufactured or bought and sold there, but what was the value of merchandise of that kind in that condition in the foreign markets at the time of exportation. In this view it is unimportant whether the importer made one contract or two for the matches and the boxes, or whether he bought them both of one person, or the matches of one person and the boxes of another. They did not become the article imported until the matches were placed in the boxes to be exposed for sale in the market. This point is very important, because it has arisen and may arise with respect to many other imported articles.

Assuming that cigars are usually exposed for sale and

bought and sold in the foreign market in boxes at a price which includes the value of the box, and that in that condition they are imported into this country, the application of this principle includes in the dutiable value of the article the value of the box.

The same principle applies to Malaga grapes in casks, assuming that they are usually bought and sold in the foreign market by the cask, and to barrels of cement and similar articles if they are usually bought and sold in the foreign market and exported by the cask.

In all such cases the cask or covering usually included in the general price of the contents as exposed for sale in the foreign market is a part and parcel of the article, and its value constitutes a part of the dutiable value of such article.

It is suggested, however, that there are some articles which in the usual course of trade are sometimes bought and sold in the foreign market in casks or other packages and sometimes in bulk, and in both these conditions imported into the United States. If one usual method of buying and selling cement, for instance, in the foreign market is in casks, and the invoice in question was actually bought and sold in casks as an entirety, then the value of it in the casks would form the dutiable value of the cement.

If, on the other hand, it were usual to buy and sell the same article in bulk, and the invoice in question was actually bought and sold and shipped in bulk, nothing could be added to the value for casks or other covering. The actual market value of cement in any usual condition in which it is bought and sold in the foreign market is its dutiable value here, if imported in that condition.

This principle is well illustrated in Barnard *vs.* Mortor (1 Curtis, 404), in which case it appeared that—

> Salt, exported from Liverpool, is chiefly made in the county of Cheshire; that the manufacturers have agents

> at Liverpool, who sell it deliverable either at the works or at the port of Liverpool. It is sold in bulk by the ton, and the purchaser directs it to be packed in bleached or half-bleached sacks, the former for fine salt, the latter for coarse. Except some fine salt, known as "factory-filled salt," it comes down the Mersey in bulk, and is filled on board, or alongside, the vessel in which it is exported, at the expense of the purchaser. The seller procures the bags for the purchaser, and makes a separate charge to him of their cost; and the invoices make the bags a distinct item. The *charges* in the invoices are the expenses incident to getting the article on shipboard. The seller of the salt procures the sacks, puts the salt in them, and charges the salt and the sacks to the purchaser; this is the cost of the salt; then the charges are added. The whole constitutes the cost of the cargo.

And, again, it appears that "salt in bulk and bag-salt is each a distinct and well-known article of commerce in the United States." Again:

> The article entered was salt; but it appears there are two kinds of salt known in this market—salt in bulk and bag-salt. The latter is what the plaintiffs entered. Their entry is "2,670 sacks salt." The question is, whether the price of the sacks is a cost or charge within the meaning of this law."

As significant of the intention of Congress that the particular purchase and sale in question shall not constitute the standard of value, the provision of the law by which the value in the principal markets of *procurement* was the value to be ascertained, was changed by the act of 1851 to the actual market value and wholesale *price at the period of the exportation to the United States.*

By 296 and 297, T. I., new, oranges and lemons in

boxes of prescribed capacity are subjected to a specific duty by the box or half box, and oranges in barrels not exceeding a certain capacity to a specific duty by the barrel. Such fruit imported in the standard boxes, or in barrels, is subject to the specific duty prescribed, and it is immaterial when or how or by whom it was bought or sold or packed.

Under the same paragraphs oranges in bulk are subject to a specific duty of $1.60 per thousand, and lemons in bulk $2 per thousand, and if imported in bulk no addition for boxes or coverings is to be made. Paragraph 298, T. I., new, prescribes a duty on lemons and oranges, in packages not specially enumerated or provided for in this act, of 20 per centum ad valorem.

To this class of fruit in packages the common rule applies. If the packages or boxes imported are those in which such fruit is usually bought and sold in the principal markets of the country of exportation, the price of them being included in the price of the fruit, no deduction for packages or boxes should be made.

If the packages or boxes in which the fruit is imported are not of such description, but are rough boxes or bags or coverings, merely for the convenience of transportation, nothing should be added for such coverings.

In Cobb *vs.* Hamlin (3 Clifford, 191) the court makes a distinction between goods purchased and sold in foreign markets in bulk and subsequently put into boxes, &c., for the preservation of the merchandise and the *convenience of shipping*, and goods put into boxes, &c., by the producer, manufacturer, or wholesale merchant.

In a subsequent case (*Harding* vs. *Whitney*, 4 Cliff., 96) the same court held that where wool was purchased and sold in the bale in the foreign markets, the words "actual market value" include the covering as well as the goods.

In this connection it is proper to advert to section 9 of the act of March 3, 1883, which provides, in substance, that

where the true and actual market value and wholesale price of imported goods cannot be ascertained to the satisfaction of the appraiser, it shall then be lawful to appraise the same by ascertaining the cost or value of the materials composing the merchandise at the time and place of manufacture, together with the expense of manufacturing, preparing, and putting up such merchandise for shipment, and that in no case shall the value of such goods be appraised at less than the total cost or value thus ascertained. The laws of appraisement have reference to a value which can be ascertained generally as a matter of fact upon evidence of prices at which goods in a certain condition are bought and sold.

If the importer, by some arrangement with manufacturers and dealers abroad, puts his merchandise into a condition unknown to the markets of the country of exportation, so that its value cannot be ascertained in the ordinary way, then the appraiser should assess the value by the method provided in section 9, just cited. This provision should be applied alike to cases where the whole product of a manufacturer making goods of a peculiar character are consigned to one person in the United States, so that there are no sales in the country of exportation, and therefore no established market value; and to cases where purchasers abroad, for the purpose of escaping the regular duties imposed by the tariff, put their goods in a condition not recognized in foreign markets, and so that no market value can be fixed in the usual way.

Your action in including the value of the boxes in the dutiable value of the matches embraced in this importation is affirmed.

Very respectfully,

CHAS. J. FOLGER,
Secretary.

COLLECTOR OF CUSTOMS, *New York.*

5706.

Dutiable value of imported merchandise.

TREASURY DEPARTMENT, *May* 15, 1883.

The question has been presented to this Department, What items of cost are to be regarded as included in the value of imported merchandise under the act of March 3, 1883, which repeals the duties on charges and commissions incident thereto?

Under the laws in force prior to the passage of said act the dutiable value of imported merchandise was made up, first, of the cost or the actual market value or wholesale price of the goods in the principal markets of the country from whence exported, and at the period of exportation to the United States; and second, by adding thereto the cost of transportation, shipment, and transshipment, with all the expenses included from the place of growth, production, or manufacture, whether by land or water, to the vessel in which shipment is made to the United States, the value of the sack, box, or covering of any kind in which such merchandise is contained, commission at the usual rates, but in no case less than $2\frac{1}{2}$ per cent., and brokerage, export duty, and all other actual or usual charges for putting up, preparing, and packing for transportation or shipment.

These provisions are found in sections 2906, 2907, and 2908 of the Revised Statutes.

Section 7 of the act of March 3, 1883, repeals sections 2907 and 2908, and section 14 of the act of June 22, 1874, which imposed a penalty of 100 per cent. for failure to add, on entry, the charges and commissions specified in section 2907, and provides that—

> Hereafter none of the charges imposed by said sections or any other provision of existing law shall be estimated in ascertaining the value of goods to

be imported, nor shall the value of the usual and necessary sacks, crates, boxes, or covering of any kind be estimated as part of their value in determining the amount of duties for which they are liable: *Provided*, That if any packages, sacks, crates, boxes, or coverings of any kind shall be of any material or form designed to evade duties thereon, or designed for use otherwise than in the bona fide transportation of goods to the United States, the same shall be subject to a duty of 100 per cent. ad valorem upon the actual value of the same.

The dutiable value of merchandise is, therefore, now confined to its cost or actual market value or wholesale price, as provided in section 2906. Whatever items of expense are included in such cost, price, or value, and in the condition in which the goods are actually and usually held for sale at the place of growth, production, or manufacture, are all to be included in the dutiable value. Under the seventh section of the act of March 3, 1865, which repealed the duties on the charges and commissions now specified in section 2907 of the Revised Statutes, the question was presented to the Department, "whether duty will be exacted on the market value of wine imported in bottles with certain labels, or upon the value of such wine previous to the bottling and labelling." On November 16, 1865, the Secretary of the Treasury declared that he regarded "the market value or wholesale price of an article to be whatever such article sells for in the market for cash, and that it is quite immaterial whence such value is derived, whether from labels or any other cause or device whatsoever. The wholesale cash price is the pertinent inquiry, and not the reason why an article obtains that price."

On an appeal of Dix & Steiner, it was held by Secretary McCulloch, January 30, 1866, that the market value of oranges and lemons is to be found when they are in

the condition in which they are bought and sold—that is, in their true commercial state for traffic. He then stated:

> I am of the opinion, therefore, that boxes, &c., become merchandise when they enter into the value and are sold with the articles they contain.

In the case of Cobb against Hamlin, reported in the Internal-Revenue Record of October 17, 1868, page 121, it was held by Judge Clifford that where oranges and lemons were purchased in bulk by the thousand, and subsequently put into packages for preservation and convenience in shipping, the actual market value thereof, within the meaning of the act of Congress of March 3, 1865, does not include the cost of the packages, but only the cost of the merchandise in bulk at such foreign market. But he says:

> No doubt is entertained that the words "actual market value," without more, would include the cost of the box, package, or covering in all cases where the merchandise in question was actually purchased in the box, package, or covering, and is usually so purchased and sold for shipment in the foreign market, and where the price includes the box, package, or covering, as well as the goods therein contained.

In Grinnell *vs.* Lawrence (1 Blatch. C. C. R., p. 128), Judge Nelson says that "the market value of goods at a given port includes all previous cost and charges of production and of transportation to, and delivery at, that market."

In accordance with the doctrine laid down in these decisions, this Department holds that the cost or market value, or wholesale price which is now the basis of assessment of ad valorem duties, includes all elements of expense which have been incurred in placing the goods in the condition in which they are actually and usually held for sale in the foreign market.

As illustrations of the principle, it may be stated that the value of cigars which are bought and sold in the box includes the value of the box, which usually contains 50 or 100 cigars ; the value of buttons which are mounted on cards includes the cost of the cards; the cost of cartons containing artificial flowers, and other articles which go with the goods, and are necessary to put them in a marketable condition by the manufacturer, is merged into and forms a part of their market value. In short, the market value remains as the dutiable value, while the cost of the coverings necessary to the transportation from the place of growth, production, or manufacture to the exporting vessel, and the other items mentioned in section 2908, have ceased to be a part of such dutiable value.

Where, therefore, items of expense of the nature before specified are omitted from the value declared on entry, it will be the duty of the appraiser, in determining the dutiable value, to take that fact into account and to conform his return to the rule herein laid down.

Where parties may be dissatisfied with the appraised value, their remedy is by an appeal for reappraisement, under section 2930 of the Revised Statutes, and not in an appeal to this Department, under section 2931. Protest and appeal, however, may be filed in any given case where a decision of the Department is desired as to whether any steamer once clearing upon such an oath, unless such steamer shall since the first clearance have been duly inspected by the inspectors and have received a certificate of inspection, which fact would be usually verified by the records of your office.

Very respectfully,

H. F. FRENCH,
Acting Secretary.

COLLECTOR OF CUSTOMS, *New York.*

(5887.)

Violin cases—duty on.

TREASURY DEPARTMENT, *September* 4, 1883.

SIR: This Department is in receipt of your letter, dated the 28th ultimo, transmitting the appeal (7986*h*) of Messrs. Lyon & Healy from your assessment of duty at the rate of 35 per cent. ad valorem on certain violin cases imported, per "General Werder," at New York, July 23, 1883, and transported to your port under immediate-transportation entry 8693.

The appellants claim that the cases are dutiable at the rate of 25 per cent. ad valorem, as the natural and ordinary covering of the violins.

It is understood that the cases in question are such as are ordinarily used to hold violins, and the Department is of opinion that such of them as are imported with the violins are dutiable at the same rate as the instruments contained therein. The cases not accompanied by violins were dutiable separately, otherwise than under the provision for musical instruments. You may reliquidate the entry accordingly, and take measures for a refund of the duties levied in excess.

Very respectfully,

JNO. C. NEW,
Acting Secretary.

COLLECTOR OF CUSTOMS, *Chicago, Ill.*

DEPARTMENT OF JUSTICE,
Washington, D. C., January 11, 1884.

SIR: I have carefully examined the following questions, which are presented for my consideration in your communication of the 26th of November last:

First. Whether section 7 of the tariff act of March 3, 1883, does more than repeal duties upon the charges

imposed by the sections of law named in said section 7, and which are thereby repealed, and other provisions of law, if any, of the same character.

Second. Whether that section prohibits the inclusion, in the dutiable value of merchandise, of the value of the boxes and coverings which are part of its preparation for sale in the markets of the country of exportation.

Third. Is the dutiable value of merchandise its actual market value or wholesale price in such markets as enhanced by its preparation for sale in such markets by the placing in or about or upon such merchandise such boxes and other coverings as are named in question No. 2?

Fourth. Whether there is any distinction to be made in the assessment of duties, as to the boxes and coverings which are part of such preparation, between the boxes and coverings which do and those which do not go to the consumer.

In illustration of this question you remark:

"I may say that in the case of shoe-blacking, matches, and cigars, the merchandise is inclosed in packages which go to the ultimate consumer, and, to a large extent, serve as receptacles for the article until entirely consumed. In other instances the boxes and other coverings do not usually reach the ultimate consumer; as in the case of stockings and handkerchiefs put up in small boxes and sold through the manufacturer by the dozen or other specified quantity, and at a value which includes that of the small boxes in which the dozens are contained. The retailer sells from the boxes, in many instances quantities less than a box, and where a whole box is sold, no additional charge is made for the value of the box."

Fifth. Whether the value of paper and trade-marks, ribbons, and ornamental devices, which form part of

the preparation of each piece of silk or velvet, for such markets, is to be included in the general market value or wholesale price.

In connection with this question you observe:

> Silks and velvets are put up for the foreign market with trade-marks and tickets thereon, and are wound on a board and covered with a piece of paper or a piece of cloth sewn around each piece to protect it, and ribbons are wound on wooden blocks. Appeals have been presented against the insertion in the dutiable value of any of these elements of expense. The question arises—
>
> Sixth. Whether the wooden blocks on which ribbons are wound, and the boards on which silk and velvets are wound, in preparation for such markets, shall be deemed a covering of any kind within the intent of said section 7.

In this connection you further observe:

"Appeals have also been taken in which it is claimed that there should be deducted from the dutiable value the cost of labor in putting the merchandise into boxes or coverings such as have been described. The question therein arises—"

> Seventh. Whether any cost or value of labor in putting merchandise into boxes or coverings, in preparation for such markets, can be in any view considered a part of the value of such box or covering within the intent of said section 7.
>
> And finally what, if any, boxes or other coverings or item of labor or preparation herein described, should be estimated or omitted in fixing the dutiable value of imported merchandise under said act of 1883?

A brief review of the previous legislation fixing the basis for the estimation of ad valorem duties may aid in reaching correct conclusions as regards the scope and effect

of section 7 of the act of March 3, 1883, upon that subject, and lead to a satisfactory solution of the questions submitted. This legislation is contained in the following statutes: Section 17 of the act of July 31, 1789, chapter 5; section 39, act of August 4, 1790, chapter 35; section 3, act of January 29, 1795, chapter 17; section 61, act of March 2, 1799, chapter 22; section 1, act of April 27, 1816, chapter 107; act of March 3, 1817, chapter 50; section 4, act of April 20, 1818, chapter 79; section 5, act of March 1, 1823, chapter 21; section 8, act of May 19, 1828, chapter 55; section 15, act of July 14, 1832, chapter 227; section 16, act of August 30, 1842, chapter 207; act of March 3, 1851, chapter 38; section 28, act of March 2, 1861, chapter 68; sections 23 and 24, act of June 30, 1864, chapter 171; section 7, act of March 3, 1865, chapter 80; section 9, act of July 28, 1866, chapter 298; and sections 2904 to 2908, inclusive, of the Revised Statutes.

By the acts of 1789 and 1790 the actual cost of the merchandise at the place of importation, with the addition of a percentage thereon (20 per cent. if imported from the Cape of Good Hope or any place beyond the same, and 10 per cent. if imported from elsewhere), was made the basis for estimating ad valorem duties, and all charges were expressly excluded therefrom.

The act of 1795 made "the actual cost at the place of exportation, including all charges (commissions, outside packages, and insurance only excepted)," the basis for that purpose.

The act of 1799 made "the actual cost at the place of importation, with the addition of a percentage, as in the acts of 1789 and 1790, together with all charges (commissions, outside packages, and insurance only excepted)," the basis.

The act of 1816 made "the net cost of the article at the place whence imported (exclusive of packages, commissions, and all charges)," with the addition of a percentage as above, the basis.

The act of 1817 provides the same basis as the act of 1816, "exclusive of packages, commissions, charges of transportation, export duty, and all other charges."

By the act of 1818 the basis is the same as that prescribed by the act of 1799. All charges are included "except commissions, outside packages, and insurance."

By the act of 1823 the actual cost, if purchased, or the actual value if otherwise procured, at the time and place when and where purchased or otherwise procured, or the appraised value, if appraised, with all charges added thereto except insurance, and also with the addition of a percentage upon such cost or value and charges, as above, is made the basis.

By the act of 1828 the actual value at the time of purchase, and place whence imported, with the addition thereto of all charges except insurance, and also of a percentage, as above, is made the basis.

The act of 1832 makes the basis the same as that of the act of 1823, omitting the percentage. It includes all charges except insurance.

By the act of 1842 the actual market value or wholesale price, at the time when purchased, in the principal markets of the country from whence imported, with the addition thereto of "all costs and charges except insurance, and including, in every case, a charge for commissions at the usual rates," is made the basis.

In the act of 1851 the basis is the same as it is in the act of 1842, the only material change being that the "period of exportation" is made the time.

The act of 1861 makes the "day of actual shipment" the time, but introduced no other change.

By the act of 1864 the basis is the actual value of the goods on shipboard at the last place of shipment to United States, to be ascertained by adding to the value at place of growth, production, or manufacture the cost of transportation, shipment, and transshipment, with all the expenses included, from such place, whether by land or water, to

the vessel in which shipment is made to the United States; also "the value of the sack, box, or covering of any kind in which such goods are contained, commission at usual rate, in no case less than 2½ per cent., brokerage, and all export duties, together with all costs and charges paid or incurred for placing said goods on shipboard, and all other proper charges specified by law."

By the act of 1865 the actual market value or wholesale price, at the period of the exportation, in the principal markets of the country from whence imported is made the basis. This act repeals sections 23 and 24 of the act of 1864, and "all acts and parts of acts requiring duties to be assessed upon commissions, brokerage, costs of transportation, shipment, transshipment, and other like costs and charges incurred in placing any goods, wares, or merchandise on shipboard, and all acts or parts of acts inconsistent with the provisions of this act."

The act of 1866 modifies the basis prescribed by the act of 1865, by adding thereto

> The cost of transportation, shipment, and transshipment, with all the expenses included, from the place of growth, production, or manufacture, whether by land or water, to the vessel in which shipment is made to the United States; the value of the sack, box, or covering of any kind in which such goods are contained; commission at the usual rates, but in no case less than 2½ per cent.; brokerage, export duty, and all other actual or usual charges for putting up, preparing, and packing for transportation or shipment.

The provisions of the acts of 1865 and 1866, just adverted to, are embodied in the Revised Statutes, those of the act of 1865 in section 2906, and those of the act of 1866 in section 2907, under which sections the basis for estimating ad valorem duties remained as it was established by those acts until the passage of the act of March 3, 1883.

Section 7 of the last-mentioned act repeals said section 2907, leaving in full force section 2906. This is virtually a return to the basis prescribed by the act of 1865, before the modification thereof by the act of 1866, namely, the actual market value or wholesale price, at the period of exportation, in the principal markets of the country from which the merchandise is imported (or in the principal markets of the country of production or manufacture, when the importation is from a country in which the merchandise has not been manufactured or produced—see section 2905, Revised Statutes), without any addition for costs or charges of any kind whatever. The above repeal, together with the repeal of section 2908, Revised Statutes, and of section 14 of the act of June 22, 1874, also made by section 7, aforesaid, sweeps away all the provisions in force at the date of the act of 1883, which required or contemplated additions of that character to the market value or wholesale price of merchandise, in determining its dutiable value. The clause in section 7 declaring that "hereafter none of the charges imposed by said sections, or any other provisions of existing law, shall be estimated in ascertaining the value of goods to be imported, nor shall the value of the usual and necessary sacks, crates, boxes, or covering of any kind be estimated as part of their value in determining the amount of duties for which they are liable," adds nothing to and takes nothing from the force and effect of the repeal of the statutory provisions mentioned. It only emphasizes the intent of Congress in making the repeal, namely, that all charges theretofore required to be estimated as part of the dutiable value of merchandise should thereafter be excluded in ascertaining such value.

It results from the foregoing that, as regards the basis on which ad valorem duties are to be estimated, the only change effected by section 7 of the act of 1883 is to exclude from such basis all costs and charges which, under the law as it previously stood, were required to be *added*

to the current or actual market value or wholesale price of the merchandise in the principal markets of the country whence the same was imported, or of the country of production or manufacture, as the case might be. Thus the current or actual market value or wholesale price in those markets, which is to be appraised, is now made the *sole basis* for estimating such duties.

Recurring to the questions presented, I submit that the answer to the first of these questions is sufficiently indicated by what has just been stated.

The second and third questions may be conveniently considered together. As already shown, the dutiable value of merchandise, since the modification of the customs law made by the act of 1883, is the current or actual market value or wholesale price thereof in the foreign market at the period of exportation, to be ascertained by appraisement (sections 2905 and 2906, Rev. Stat.). What, then, is to be understood by current or actual market value or wholesale price as used in the statute? It is the amount of money or price which the article commands in the foreign market, in the condition in which it is there customarily sold and purchased. As observed by the court in Cobb *vs.* Hamlin (3 Cliff., 191):

> Some descriptions of goods are purchased and sold in the foreign market in bulk, and are subsequently to the purchase and sale put into boxes, packages, or coverings by the purchaser, for the preservation of the merchandise and the convenience of shipping. Other descriptions are put into boxes, packages, or coverings by the producer, manufacturer, or wholesale merchant. The actual market value in the former case does not include the cost of the box, package, or covering within the meaning of that act of Congress [the act of 1865, hereinbefore mentioned], as the boxes, packages, or coverings in such cases are purchased by the shipper as the means of preserving

> the goods, and for the convenience of shipment. But no doubt is entertained that the words "actual market value," without more, would include the cost of the box, package, or covering, in all cases where the merchandise in question was actually purchased in the box, package, or covering, and is usually so purchased and sold for shipment in the foreign market, and where the price includes the box, package, or covering, as well as the goods therein contained.

In that case the court held that where oranges and lemons were, in conformity to the general custom in the foreign market, purchased in bulk, and were afterwards wrapped one by one in paper and packed in boxes and transported to the place of shipment, the expense of the boxes, &c., and the labor of packing the fruit, did not constitute an element of its actual market value within the meaning of the act of 1865. And in a subsequent case (*Harding* vs. *Whitney*, 4 Cliff., 96) the same court held that where wool was purchased and sold in the bale in the foreign market, the words "actual market value," in the act of 1842, include the cost of the covering as well as the goods, as the whole are sold together without any additional charge for the covering—that such expense enters into and forms a constituent part of the market value and wholesale price of the merchandise at the place of exportation. In the first case, under the law as it existed before the passage of the act of 1883, the cost of the boxes, &c., and of the labor in packing the fruit, would be charges proper to be *added* to the actual market value of the fruit in ascertaining its dutiable value; while in the other case the *addition* of the cost of the baling and covering to the actual market value of the wool would not be proper, as such cost enters into and is included in the actual market value of the article.

According to the principle of these cases, which appears to me to be both sound and practicable, the cost of boxes

or coverings with which goods are ordinarily prepared for sale in the foreign market, and in which they are usually sold and purchased there (the price paid for the goods including the box or covering, which goes therewith to the purchaser), must be regarded as entering into or as being an element of the actual market value of the goods. Section 7 of the act of 1883 does not forbid the inclusion in the dutiable value of merchandise of that which forms a constituent of its actual market value. Hence the dutiable value of goods usually prepared for sale as above, and thus usually sold in the foreign markets, is their current or actual market value or wholesale price in such market as enhanced by the preparation thereof for sale in the manner referred to. In the language of your circular of September 27, 1883:

> The dutiable value of the goods is the actual market value or wholesale price thereof in the condition of finish and preparation for sale in which they are finally offered by the foreign merchants to negotiating customers, and for which they will and do sell them, though that value or price be enhanced because of that finish and preparation, and though a part of the preparation consists in the placing in or upon or about the goods boxes, cartons, paper, cards, or other like thing.

In answer to the fourth question, I submit that, with respect to boxes and coverings which are part of the preparation of goods for sale in the foreign market, and are there sold with the goods as above stated, no distinction is admissible between those which do and those which do not go to the ultimate consumer. What becomes of the box or covering in the course of trade, after the importation of the good, is unimportant, and in no way affects the question of dutiable value.

The remaining questions seem to be covered by the remarks already made in answer to the second and third

questions. The expense of the usual and customary preparation of silks, velvets, and ribbons for sale in the foreign market, to which the former questions refer, necessarily enters into the actual market value of those articles in that market. This being so, and the price paid for the goods in that market including such expense, the latter is not to be estimated separately for "insertion in the dutiable value," nor is any part thereof to be estimated and deducted from the dutiable value. The current or actual market value or wholesale price of the goods, in the condition in which they are usually sold and purchased in the foreign market, and that alone is required to be ascertained. Such value or price of the goods is now their dutiable value, and to add to or deduct from the latter costs or expenses of any kind which necessarily enter into and are included in the former, would be unwarranted by the existing law.

I am, sir, very respectfully,

BENJAMIN HARRIS BREWSTER,
Attorney-General.

Hon. CHAS. J. FOLGER,
Secretary of the Treasury.

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In the Supreme Court of the United States.

OBERTEUFER ET AL
vs.
W. H. ROBERTSON, COLLECTOR. } No. 1192.

MOTION TO ADVANCE CASE UNDER RULE 26.

This case is before this court upon a writ of error recently sued out by the plaintiffs, and involves the question as to the meaning and effect of section 7 of the tariff act of March 3, 1883, the particular question being whether it was right for the customs officers in fixing the market value of imported stockings and gloves to include items for the cartons or pasteboard boxes in which the stockings and gloves were packed by the dozen and half dozen.

This motion is made on the ground that a very large number of suits are now pending at different ports throughout the United States which will be governed by the final decision of the Supreme Court in this suit. It is represented also that since the statute took effect the collector of the port of New York and the Secretary of the Treasury have been seriously embarrassed by the large number of protests and appeals under the section in question which have been filed with them.

Respectfully submitted.

JOHN GOODE,
Solicitor-General.

NOVEMBER 7, 1885.